01-3128

SUPREME COURT OF WISCONSIN

Appeal No. 01-3128

CONLEY PUBLISHING GROUP, LTD.,
FREEMAN NEWSPAPERS LLC AND
LAKESHORE NEWSPAPERS, INC.,

Plaintiffs-Appellants,

v.

JOURNAL COMMUNICATIONS, INC. AND
JOURNAL SENTINEL, INC.,

Defendants-Respondents.

ON APPEAL FROM THE CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE DONALD HASSIN, PRESIDING
Case No. 00-CV-222

BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. On a motion by the defendant for summary judgment, was there a genuine issue of material fact as to whether the Journal had engaged in predatory pricing?

Answered by the Trial Court: No.

B. On a motion by the defendant for summary judgment, was there a genuine issue of material fact as to whether the Journal's anticompetitive conduct had caused injury to the plaintiff?

Answered by the Trial Court: No.

C. Under Wisconsin law, must a plaintiff in a civil suit under Chapter 133, Wis. Stat., satisfy the requirements of the so-called federal "disaggregation" doctrine in order to avoid summary judgment?

Answered by the Trial Court: Yes.

Appellate review of summary judgment is de novo, i.e., the appellate court reapplies the same methodology applied by the trial court. In re Cherokee Park Plat, 113 Wis. 2d 112, 115-116, 334 N.W. 2d 580, 582 (Ct. App. 1983).

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III. STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. The Parties.

1. The Waukesha Freeman and plaintiff-appellant Conley Publishing Group.

The Waukesha Freeman is a paid daily (Monday-Saturday) newspaper that has been an integral part of life in Waukesha County since 1859.[1] Founded with the support of Waukesha abolitionists, the Freeman first served as a weekly newspaper that spoke out against slavery in a city that served as an important stop on the Underground Railroad.[2] After a series of owners between 1859 and 1874, the Freeman was acquired by the Youmans family, who owned and operated the newspaper for the next 105 years. Under the Youmans family's leadership, the Freeman was a finalist for the Pulitzer Prize for its investigations into Waukesha County law enforcement.[3] The paper also became the leader in the battle for public access to government records.[4]

The Freeman remained in the Youmans family until 1979, when it was sold to the Des Moines Register & Tribune Company.[5] In 1983, the Freeman was sold to Thomson Publishing.[6] In May of 1997, Thomson sold the Freeman to its current owners, Conley Publishing,[7] plaintiff and appellant in this case.

Conley Publishing, like its predecessors, has dedicated itself to providing thorough coverage of Waukesha County as well as state, national, and international news.[8] As it has for nearly 150 years, the Freeman continues to provide a unique voice in

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[1] R.28: ¶12. (Affidavit of J. Hovind).
[2] R.28: ¶13.
[3] R.28: ¶15.
[4] R.28: ¶15. See, Youmans v. Owens, 28 Wis. 2d 672, 137 N.W. 2d 470 (1965).
[5] R.28: ¶16.
[6] R.28: ¶17.
[7] R.28: ¶18.
[8] R.28: ¶19.

Waukesha County, as the only local newspaper published and edited exclusively within the county.[9] The Freeman does not publish a paid Sunday newspaper.[10]

2. The Milwaukee Journal/Sentinel and Defendants Journal Communications, Inc. and Journal/Sentinel, Inc.

The Milwaukee Journal/Sentinel ("Journal") was formed as a result of the merger of Wisconsin's two largest newspapers, the Milwaukee Journal and the Milwaukee Sentinel, in April 1995.[11] The Journal publishes both a daily newspaper and a Sunday newspaper.[12] The Journal's daily newspaper is the only local paid daily newspaper in Milwaukee County.[13] In Waukesha County, the daily Journal controls roughly 72% of the readership market (subscriptions), versus a 28% share for its only competitor in Waukesha County, the Freeman.[14] Moreover, the Journal's Sunday newspaper is the only local paid Sunday newspaper in Milwaukee, Waukesha, Ozaukee, and Washington Counties.[15]

B. The Journal's Efforts to Drive the Freeman Out of Business.

1. Beginning in 1996, the Journal launched, in its own words, "an aggressive campaign" against the Freeman.

As noted, the Journal has an absolute monopoly in the local Sunday newspaper market in Waukesha County – it has no competition at all.[16] But to the Journal's chagrin, it does not yet have total domination of the local daily newspaper market in Waukesha County; it must compete with the Freeman. The Freeman is the Journal's only

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[9] R.28: ¶20.
[10] R.28: ¶5.
[11] R.28: ¶21.
[12] R.15: ¶2.
[13] R.27: Ex.A. (Deposition of Journal manager H. Hoffman, p. 70: "I don't know of any other daily newspapers in Waukesha County.")
[14] A-App. p. 169 (Report of Carl G. Degen, Table 1).
[15] R.27: Ex.C. (Deposition testimony of Journal executive R. Schwartz, p. 18: "There isn't a Sunday – another Sunday player out there.")
[16] R.27:Ex.C. (Deposition testimony of Journal executive R. Schwartz, p. 18: "There isn't a Sunday-another Sunday player out there.")

competitor.[17] If the Freeman fails, as Journal president Spore testified it would[18], the Journal's domination of the local paid newspaper market in the Milwaukee metropolitan area will be complete: It will have a monopoly on both daily and Sunday paid local papers in Milwaukee County, in Ozaukee County, in Washington County, and after - 150 years - in Waukesha County.[19]

To accomplish its goal of complete market domination, the Journal in mid-1996 undertook what it described as efforts to "convert Freeman subscribers to Journal subscribers" and to capture the 28% of the Waukesha daily newspaper market it did not already control. These efforts continued and intensified throughout 1997, during the Journal's "most aggressive campaign in Waukesha County since ... 1989."[20] As the Journal's 1997 Marketing Plan put it: "Efforts to strengthen our sales position in Waukesha County as well as the City of Waukesha will continue in 1997 as they began in fall of 1996."[21]

A Journal research analyst admits that no other geographic location in the State of Wisconsin was targeted as extensively as Waukesha was targeted in 1996 and 1997.[22] In fact, the campaign against the Freeman began in full force in the fall of 1996 when the Journal's research department instituted an information gathering campaign as part of "the Waukesha County strategic plan."[23] The stated goal of the Journal's research plan was to "identify the steps we need to undertake to switch readers/advertisers from the

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[17] R.27: Ex.A. (Deposition of Journal manager L. Engel, p. 55).
[18] R.27: Ex.H, p. 14.
[19] R.27: Ex.H. (Deposition testimony of Journal president K. Spore, p. 13: Q. "You remember saying we will control the market?" A. "yeah...")
[20] R.27: Ex.I. (Journal 1997 Marketing Plan, p. 10147).
[21] R.27: Ex.I. (Journal 1997 Marketing Plan, p. 10139).
[22] R.27: Ex.J. (K. Kriefall Deposition, p. 82).
[23] R.27: Ex.K. (K. Gigowski (now K. Kriefall) memo to T. Pierce and S. Wysocki, pp. 13503-05).

Freeman to the [Journal]."[24] At deposition, the Journal research analyst in charge of developing the plan admitted that in 1996 the Journal was engaging in specific attempts to convert Freeman subscribers and advertisers to the Journal.[25]

The Journal's own documents, particularly its annual marketing plans, detail the intensity of this targeting effort. They discuss, among other things:

- the creation of the "Waukesha database"[26]
- the Journal Circulation Department's "Waukesha Focus" in 1996[27]
- the 1996 "Research Plan for Waukesha County"[28]
- the Journal Sales, Telemarketing, and Circulation Departments' "Waukesha Focus" for 1997[29]
- the meetings of the Journal's "Waukesha County task Force" in 1997[30]
- the "Waukesha Freeman Opportunity"[31]
- the "Waukesha County Effort"[32]

The Journal's efforts didn't stop there. It planned to "develop telemarketing scripts to gather Freeman subscriber information from prospects during sales conversations" and to "investigate further methods of collecting Freeman subscriber lists with [the Journal's] distribution and research staff."[33] The Journal also planned to offer a "former Freeman" discount to Freeman subscribers who switched to the Journal.[34] The

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[24] R.27: Ex.K (K. Gigowski (now K. Kriefall) memo, p. 13503).
[25] R.27: Ex.J. (K. Kriefall Deposition, p. 26).
[26] R.27: Ex.L. (Waukesha Database Requirements, 12/27/96, p. 27113-116).
[27] R.27: Ex.M. (Waukesha Focus Documents, p. 13534-13537).
[28] R.27: Ex.K (K. Gigowski (now K. Kriefall) memo, pp. 13503-13505).
[29] R.27: Ex.I (Journal 1997 Marketing Plan, pp. 10139, 10147, 10208-10210).
[30] R.27: Ex.N (memos to members of Task Force, pp. 20159-161, 20164-165).
[31] R.27: Ex.O (R. Tangle memo to L. Mueller, dated 9/25/96, pp. 13489-90).
[32] R.27: Ex.P (Troy Burke letter to Metro News Services, dated 1/16/97, pp. 6212-6213).
[33] R.27: Ex.I (Journal 1997 Marketing Plan, p. 10209).
[34] R.27: Ex.I (Journal 1997 Marketing Plan, p. 10210).

Journal even schemed to have a Journal employee pose as a Cardinal Stritch college student "doing research" who would "make direct contact" with a Freeman supervisor and gather information about the Freeman.[35]

Thus, beginning in 1996, the Journal was not simply increasing its resources and presence in Waukesha, where it competed with the Freeman for daily newspaper readers. The Journal was also specifically targeting Freeman subscribers.

2. The Journal's Sunday-daily "conversion" program made the Journal's daily newspaper -- which competes with the Freeman in Waukesha County -- available at no cost.

The Journal's primary weapon in its "aggressive campaign" to take subscribers away from the Freeman was its "Sunday – daily conversion program." This program, which is the subject of this appeal, worked as follows. The Journal hired an outside marketing company to telephone residents of Waukesha County who subscribed to the Sunday Journal but not to the daily Journal.[36] The telemarketers offered the Sunday Journal subscribers a deal wherein the Sunday subscribers would also receive the daily Journal for the remainder of their Sunday contract at no additional out-of-pocket expense if they would slightly shorten their Sunday subscription terms.[37] For example, a 52-week Sunday-only subscriber could get 49 weeks of the daily Journal at no out-of-pocket cost by agreeing to shorten the Sunday subscription term by a mere three weeks.[38] By forfeiting three Sunday newspapers with a total retail value of approximately $5.00, the subscriber would receive 49 weeks (or 294 issues) of the daily newspaper with a total

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[35] R.27: Ex.I (Journal 1997 Marketing Plan, p. 10209). At the same time, the Journal was desperately trying to steal the Freeman's advertising customers. R.27:Ex.J (K. Kriefall Deposition, pp. 26, 37-38).
[36] R.27: Ex.I (Journal 1997 Marketing Plan, p. 10154).
[37] R.27: Ex.Q (13-week telemarketing script, pp. 6203-05).
[38] R.27: Ex.R (52-week telemarketing script. p. 4503).

value of approximately $147.00 for free. The Journal also offered a 13-week and a 26-week conversion program.[39]

For all intents and purposes, the Journal was giving away the daily paper in Waukesha. But the giveaway was not for a short promotional period, such as a week or two, during which patrons could sample the daily Journal. The giveaway lasted months, even up to a year. Laura Mueller (now Laura Engel) was the sales manager for the Journal's circulation department from 1994-1999.[40] In the fall of 1996, when the Journal began its assault in Waukesha County, Ms. Mueller was given a temporary new title: "Sales and Marketing Manager/Waukesha."[41] In her deposition, Ms. Mueller described how the Sunday–daily conversion program worked, and admitted that Sunday-only subscribers "don't pay an additional penny to get the daily."[42]

The Journal's 1997 Marketing Plan provides explicit details of the conversion program's role in the Journal's "[e]fforts to strengthen [its] sales position in Waukesha County as well as the City of Waukesha while converting Waukesha Freeman subscribers to Journal Sentinel subscribers ...."[43] The Journal's 1997 Marketing Plan states that the Journal planned to "target non-subscribers within [Waukesha] zip codes 53183, 53186, and 53188, which [would] include the majority of remaining Freeman subscribers."[44] In addition, the Journal's 1997 Marketing Plan states that the explicit goal of the Journal's "Waukesha Focus" was to "secure" 10,586 new daily subscribers in Waukesha County, "ultimately securing Freeman customers as Journal Sentinel subscribers."[45] The

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[39] R.14: ¶9 (Journal Brief in Support of Motion for Summary Judgment).
[40] R.27: Ex. A (Deposition of Journal manager L. Engel, pp. 14-15).
[41] Id. at p. 15.
[42] Id. at pp. 43-44.
[43] R.27: Ex. I (Journal 1997 Marketing Plan, p. 10139).
[44] Id. (emphasis added).
[45] Id. at pp. 10147, 10208.

Journal's 1997 goal for Sunday-daily "conversions" in Waukesha was 4,986 daily subscribers,[46] and the program succeeded dramatically. According to its own documents, the Journal sold 12,750 Sunday-daily conversions in Waukesha by November 19, 1997, exceeding the original goal by 256%.

3. The Journal's "aggressive campaign" caused the Freeman to lose subscribers and sent the Freeman into a "downward spiral."

The Journal's efforts in Waukesha County were successful not only in absolute terms, but also in terms of the damage inflicted on its only competitor in that market, the Waukesha Freeman. Not surprisingly, the Freeman could not compete with the Journal leveraging its Sunday monopoly to give away free daily papers.

During the ten-year period leading up to 1996, the Freeman's circulation remained relatively constant at around 22,000 subscribers.[47] At the beginning of 1996, the Freeman had 21,424 subscribers.[48] However, by the end of 1997, the Freeman's circulation stood at 17,466.[49] In other words, during a two-year period (1996-97) in which the Journal was offering its Sunday-only subscribers the chance to get the daily paper for 3 months, 6 months, or a year without "pay[ing] an additional penny," the Waukesha Freeman lost nearly 20% of its subscribers.

The following year, 1998, was the only year between 1996 and 2000 in which the Journal did not employ its Sunday-daily conversion scheme in Waukesha County.[50] And for the only time in the 1996-2000 time frame, the Freeman actually gained subscribers in

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[46] Id. at p. 10154.
[47] R.28: ¶6.
[48] Id. at ¶7.
[49] Id at ¶8.
[50] R.27: Ex.B (Deposition of Journal manager H. Hoffman, p. 55).

1998.[51] In addition, for the only time in the 1996-2000 time frame, the Journal lost daily subscribers in Waukesha. As a result of temporarily suspending its Sunday-daily give-away program, by June of 1998 the Journal's "Waukesha [subscription levels were] under budgeted daily volume by 2,990 [subscriptions] and [were] 2,296 behind last year. . . ."[52]

Following its setbacks in 1998 when it tried to compete on a level playing field, the Journal re-instituted the Sunday-daily conversion scheme in Waukesha in 1999 and 2000.[53] During those years, the Freeman's circulation numbers again plummeted,[54] while the Journal's daily circulation numbers increased.[55] In 1999, the Freeman lost another 1,500 subscribers.[56] At the time the trial court dismissed the Freeman's claims, the paper had roughly 15,900 subscribers.[57] In other words, the Freeman lost fully 25% of its subscriber base over the period 1996-2000 during which the Journal pursued its Sunday-daily conversion program.

In the newspaper business, it is common knowledge that a decline in circulation leads to a decline in advertising revenues and that a decline in advertisers leads to further declines in circulation. Eventually, this "downward spiral" ends in the affected newspaper going out of business. One of the Journal's own experts has clearly described the phenomenon in a study he did of newspaper consolidations in Detroit:

> Newspapers sell to two different customer groups: advertisers and readers. The demands of these customers are interdependent. Advertisers are willing to pay more for

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[51] R.28: ¶9.
[52] Id.
[53] R.27: Ex.U (Responses to Conley's Amended Third Set of Interrogatories, Interrogatory No. 4).
[54] R.28; ¶10-11.
[55] R.27: Ex.W (1999 Journal Weekly Circulation report, p. 5116; 2000 Journal Weekly Circulation Report, p. 5082).
[56] R.28: ¶10.
[57] R.28: ¶11.

> advertisements in a paper with larger circulation, and readers are more likely to want to read and be willing to pay for a paper with more local advertising, especially classified advertising. As a newspaper begins to decline, these demand interdependencies give rise to a phenomenon referred to as the "downward spiral." A decline in circulation reduces the demand of advertisers. The reduction in advertisers reduces the attractiveness of the paper to readers, which all else equal leads to a further reduction in circulation.[58]

The phenomenon of the downward spiral has also been recognized by the courts in newspaper antitrust cases.[59]

As the Freeman's circulation declined, it was forced to charge less for advertising. One of the Freeman's experts, Carl Degen, concluded that the Journal's Sunday-daily conversion program damaged the Freeman in two distinct ways.[60] First, the Freeman lost $813,091 in actual subscription profit due to customers leaving the Freeman.[61] Second, the Freeman lost $747,254 in advertising revenue as a result of having fewer subscribers and thus having to charge less for advertising.[62] In making his calculations, Mr. Degen accounted for additional relevant factors, including the increase in Waukesha County's population and the general nationwide decrease in newspaper subscriptions.[63] Another Conley expert, Phil Murray, concluded that the Freeman's loss of subscribers also

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[58] Baseman, Kenneth C., "Partial Consolidation: The Detroit Newspaper Joint Operating Agreement" (1988).
[59] See, Community Publishers, Inc. v. Donrey Corp., 892 F.Supp. 1146, 1159 (W.D. Ark. 1995).
[60] A-Ap. pp. 163-190 (Report of C. Degen).
[61] A-Ap. pp. 165, 167, 169.
[62] As a result of the decline in the Freeman's circulation, Conley Publishing incurred net losses on the Freeman of approximately $1,108,800 from the time it acquired the Freeman in May of 1997 until the dismissal of this action by the trial court. R.26:¶4 (Beyer affidavit).
[63] A-Ap. pp. 169, 172.

reduced the Freeman's enterprise value by approximately $3.8 million.[64] The downward spiral also caused Conley to lay off 10% of its employees.[65]

Without relief, the Freeman – an institution in Waukesha County for over 150 years – will be driven out of business.[66] The Journal, which already has a monopoly over the local daily newspaper in Milwaukee, Ozaukee, and Washington counties will have a monopoly in Waukesha County, as well.

4. The trial court's grant of summary judgment and the Court of Appeals' Certification.

In August of 2000, Conley Publishing filed its Second Amended Complaint, alleging, among other things, that the Journal was monopolizing or attempting to monopolize the market for readership of paid daily newspapers in Waukesha County in violation of § 133.03, Wis. Stat.[67] Specifically, the Complaint alleged that the free newspaper give-away constitutes anti-competitive conduct.[68]

To show that a defendant has unlawfully monopolized or is attempting to monopolize a relevant market, a plaintiff must demonstrate, among other things, that the defendant has engaged in predatory or anticompetitive conduct.[69] One type of conduct that has traditionally satisfied this requirement is "predatory pricing."[70] The evidence in the record creates a genuine issue of material fact as to whether the Journal's Sunday-daily conversion program constituted predatory pricing and thus satisfies the predatory/anti-competitive conduct element. The trial court, however, applied federal

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[64] A-Ap. pp. 191-218. (P. Murray Report, Valuation of Waukesha County (WI) Freeman, p. 11).
[65] R.26: ¶6.
[66] R.26: ¶5.
[67] R.6: Count V.
[68] R.6.
[69] ABA Section of Antitrust Law, Antitrust Law Developments (4th ed. 1997) at p. 294 ("Predatory or anticompetitive conduct of the type required to support a monopolization claim is also required to establish an attempt claim.")
[70] See, e.g., Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117-18 (1986).

antitrust doctrine that is extremely hostile to predatory pricing claims and, in an oral ruling from the bench, granted summary judgment dismissing the Freeman's claims.[71] The court held, relying heavily on Brooke Group, Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993), that there was no genuine issue of material fact regarding predatory pricing. The trial court further held that even if there were an issue of fact regarding predatory pricing, summary judgment was still appropriate because (1) the Freeman cannot show the Journal's conduct caused its losses and (2) the Freeman cannot adequately "disaggregate" its damages. The Freeman appealed, arguing that the trial court erred in all three of those holdings. The Court of Appeals certified the Freeman's appeal to this Court[72] and certification was granted.[73]

[71] A-Ap. pp. 118-140 (J. Hassin Oral Decision).
[72] A-Ap. pp. 103-115 (Certification by Court of Appeals).
[73] A-Ap. pp. 101-102 (Supreme Court Order granting Certification).

IV. ARGUMENT

A. THE EVIDENCE IN THIS CASE RAISES A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THE JOURNAL ENGAGED IN PREDATORY PRICING OF DAILY NEWSPAPERS IN WAUKESHA COUNTY.

"Predatory pricing" has been defined as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run."[74] Under recent federal case law, predatory pricing has two elements: (1) that the defendant has charged prices below an appropriate measure of cost; and (2) that the defendant would be able in the future to raise its prices above the competitive level and thus "recoup" the losses incurred by pricing below cost.[75]

These two elements follow from the widely held view that antitrust laws should protect competition, not individual competitors.[76] Business practices are only unlawful when they threaten harm to the competitive process itself and ultimately to consumers.[77] In the case of predatory pricing, it is reasonable to ask how charging low prices can possibly harm consumers. The two elements of the offense address this question.

First, charging low prices -- even if it destroys a competitor -- will not harm consumers unless the alleged predator can raise prices above competitive levels in the future. It can do so if the market in question is highly concentrated and if there are barriers to entry that make it especially difficult for other firms to enter the market.[78] If, for example, only two firms serve a market, the dominant firm can use predatory pricing to destroy its smaller rival and obtain a monopoly. If, in addition, there are barriers to

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[74] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117 (1986).
[75] See, e.g., Brooke Group, Ltd. v. Brown & Williamson Tobacco Co., 509 U.S. 209, 224 (1993).
[76] See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977).
[77] See, e.g., Central Florida Enterprises, Inc. v. Federal Communications Commission, 683 F.2d 503, 507 n.20 (D.C. Cir. 1982)
[78] See, generally, Paul L. Joskow and Alvin K. Klevorick, "A Framework For Analyzing Predatory Pricing Policy," Yale L. J. 213 (1979).

entry, the predator, once it has a monopoly, can raise its prices without fear of new competitors entering.

The second element of a predatory pricing claim is that the challenged prices must be below "an appropriate measure of cost."[79] When prices are set below certain measures of cost, the only plausible explanation is that the price cutter is not competing on the merits but is engaged in predation.[80] (Direct evidence of a firm's subjective predatory intent may also be relevant on this score.[81])

There was more than enough evidence in the record to raise a genuine issue of material fact as to whether the Journal's Sunday-daily conversion program constituted predatory pricing. As a result, the trial court erred when it granted summary judgment dismissing the Freeman's predatory pricing claim.

One of the Freeman's experts was Dr. Frank Gollop, Professor of Economics and Director of Graduate Studies in Economics at Boston College. Professor Gollop earned his Ph.D. in economics at Harvard, has taught graduate level courses on industrial organization (the branch of economics that deals with antitrust issues), and has consulted on antitrust matters for the United States Department of Justice. His qualifications as an expert in this case have not been challenged.

Dr. Gollop concluded that both elements of a predatory pricing claim were present here.[82] Specifically, in its Sunday-daily conversion program the Journal supplied daily papers for less than the appropriate measure of cost. In addition, because of high

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[79] See, e.g., Vollrath Co. v. Sammi Corp., 9 F.3d 1455, 1460 (9th Cir. 1993), cert. denied, 511 U.S. 1142 (1994).

[80] For an argument that above-cost pricing can be predatory, see, e.g., Aaron S. Edlin, "Stopping Above-Cost Predatory Pricing," 111 Yale L.J. 941 (2002).

[81] See, e.g., McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1500 (11th Cir. 1988), cert. denied, 490 U.S. 1084 (1989).

[82] A-Ap. pp. 147-148. (Report of Frank M. Gollop, Ph.D.).

barriers to entry into the daily newspaper market, once the Journal destroys the Freeman it will have a monopoly in the market for readership of daily newspapers in Waukesha County and be able to recoup.

The trial court rejected Dr. Gollop's expert analysis as unpersuasive, but in doing so the court usurped the role of the jury and committed reversible error.

1. There is a genuine issue of material fact regarding whether the Journal's Sunday-daily conversion program involved a price below the relevant measure of cost.

On the "below cost" element of the predatory pricing claim the trial court said:

> Professor Gollop's opinion concludes that on an individual cost basis that the Journal is arguably selling the newspaper for something less than it costs to produce it. What Professor Gollop's opinion does not include is an opinion as to whether or not or excuse me, that it fails to address the material issue of whether or not the total advertising revenue as folded into the contracts – strike that. As folded into the price of the paper is below the cost to either the Journal or its competitor.
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> At this point this Court concludes that the opinion of Dr. Gollop is simply that the cost is no more than what's described as something less than the market price. There is no testimony by Dr. Gollop that this particular newspaper as sold by the Journal under this particular arrangement is anything less than the rival cost of the Waukesha Freeman.[83]

Thus, even though the Journal was giving away the daily paper (i.e., charging a price of $0), and even though as a matter of simple logic it must have cost something to produce those daily papers, the court concluded as a matter of law that there was no predatory pricing because the Freeman's expert did not somehow take advertising revenue into account, as the Journal and its expert believed he should have. In other words, the trial court presumed on a motion for summary judgment to weigh conflicting evidence.

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[83] A-Ap. pp. 13-14 (J. Hassin Oral Decision).

Professor Gollop did not "consider advertising" in his analysis because in his expert opinion it was not necessary to do so. The Journal's own documents indicate that the incremental cost of supplying a daily newspaper to a subscriber in Waukesha County is at least 35 cents.[84] Based on these incremental costs and the fact that Journal subscribers "didn't pay a penny" for the daily paper, the Journal's Sunday-daily conversion program constituted below-cost pricing. That is precisely the opinion Dr. Gollop offered.

Even though subscribers didn't pay a penny for the daily Journal under the conversion program, one might argue that the Journal received "revenue" because it shortened slightly the length of the Sunday subscription. For example, under the 52-week conversion program the Journal shortened the Sunday subscription by three weeks. But even if the Journal sold those three extra Sunday papers at the full newsstand price, the revenue received would be about $5.00, still far less than the $102.90 in marginal cost to supply 294 issues of the daily paper. Even for its shortest Sunday-daily conversion program, the Journal incurred $18.90 in marginal costs (6 papers per week x 9 weeks x $.35/paper) in return for (at a maximum) additional revenue of around $7.00 if the Journal sold the four extra Sunday papers to somebody else at full newsstand price.

Based on such evidence, Professor Gollop stated that the Journal's Sunday-daily conversion program was a clear case of pricing below cost. Was his conclusion somehow fatally flawed because he did not set off against the incremental cost of supplying daily papers the additional advertising revenue the Journal allegedly earned by gaining daily subscribers in Waukesha? This is a jury question. On a motion for summary judgment the court's role is not to determine the reliability of the parties'

[84] R.27: Ex. G (Journal 2000 Marketing Plan, p. 11984).

respective experts and the weight to be given to the evidence. The Minnesota Court of Appeals made this point in a predatory pricing case brought under Minnesota's antitrust statutes.[85] In that case, plaintiff's former CEO offered calculations regarding the defendants' costs, but the defendants challenged his methodology. Based in part on the defendants' critique, the trial court granted them summary judgment. This was error:

> This raises a genuine issue of material fact .... The [trial] court, however, improperly determined the credibility of [plaintiff's witness's] calculations and the weight to give to the evidence .... Accordingly, because there is a "legitimate dispute" about [plaintiff's] characterization of [defendant's] fixed and variable costs, we conclude the issue should be resolved by the fact finder.[86]

Likewise, there is a legitimate dispute here regarding whether it is appropriate in a predatory pricing case to look beyond the price the defendant actually charges. The Journal argues it is appropriate; the Freeman argues it is not. The issue should be resolved by the factfinder.

In presuming to pass judgment on Professor Gollop's expert opinion, the trial court effectively appointed itself "gatekeeper." While the federal courts, under Daubert,[87] have been instructed to play gatekeeper, Wisconsin has expressly rejected Daubert:

> Unlike in the federal system, where the trial court has a significant 'gatekeeper' function in keeping from the jury expert testimony that is not reliable ... the trial court's gatekeeper role in Wisconsin is extremely limited.[88]

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[85] Prestressed Concrete, Inc. v. Bladholm Bros. Culvert Co., 498 N.W. 2d 274 (1993).
[86] Id. at 278.
[87] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
[88] Green v. Smith & Nephew AHP, Inc., 2000 WI App. 192, ¶21, 238 Wis. 2d 477, 497, 617 N.W. 2d 881, 890.

In Wisconsin, "expert testimony is admissible if relevant and will be excluded only if the testimony is superfluous and a waste of time."[89] Moreover, "[o]nce the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment."[90]

2. There is a genuine issue of material fact regarding whether the Journal would be able to "recoup" once it drives the Freeman out of the market.

The trial court also concluded -- as a matter of law – that the Freeman cannot satisfy the "recoupment" element of a predatory pricing claim:

> There is no showing by Dr. Gollop or any other witness in this record at this point that the Journal will at some future date be charging higher prices for its paper, and secondly, what the necessary amount it needs to recoup from its loss is or even that the Journal has or will suffer a loss as a result of the Sunday subscriber program.[91]

Once again, the opinion of the Minnesota Court of Appeals is illuminating:

> [T]he [trial] court erred by concluding no genuine issues of material fact existed about whether [defendants] had a reasonable opportunity to recoup lost profits .... [Plaintiff's ex-CEO] testified that substantial investment was needed to enter the pipe market. [Plaintiff's] expert economist testified the pipe and bridge markets were controlled by four or fewer firms. [He] also alleged high plant and capital costs, well-entrenched firms, collusive behavior (including price fixing and bid rigging), and geographic market divisions created high barriers to entry into the pipe and girder markets. Viewed in the light most favorable to [plaintiff], this evidence raises genuine issues of material

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[89] State v. Walstad, 119 Wis. 2d 483, 516, 351 N.W. 2d 469, 486 (1984).
[90] State v. Peters, 192 Wis. 2d 674, 690, 534 N.W. 2d 867, 873 (Ct. App. 1995). Even under Daubert, we submit that "gatekeeping" is inappropriate here. Dr. Gollop's opinions, consistent with his exemplary credentials, were grounded in bedrock economic analysis.
[91] R.40 at p. 14.

> fact whether [defendants] had a reasonable expectation of recouping profits from their alleged predatory pricing.[92]

Here Professor Gollop concluded that Waukesha County is a "separate relevant economic market for daily paid newspaper subscriptions"[93] in which only the Journal and the Freeman compete. The Freeman has roughly 28% of the market and the Journal has roughly 72%.[94] If the Journal destroys the Freeman the market will be highly concentrated indeed: the Journal will have a monopoly. Moreover, barriers to entry will prevent other firms from entering the market once the Freeman is gone:

> Significant barriers to entry confront any enterprise attempting to enter a paid-subscription daily or Sunday newspaper market. Significant scale economies exist both in the production and distribution of newspapers. Production is also characterized by high fixed costs. In addition, entry requires substantial capital requirements and the ability to withstand losses for significant periods of time as the entrant attempts to penetrate embedded subscriber and advertiser loyalty to the incumbent papers(s). . . [A]n additional barrier arises because much of the expected entry costs are truly sunk – that is, they are irreversible and cannot be recovered through future action or sale. It is my opinion that entry barriers into both daily and Sunday newspaper markets are substantial.[95]

Because the evidence raises genuine issues of material fact, the trial court erred when it took it upon itself to weigh that evidence and to find for the moving party, the Journal.

3. Wisconsin should not adopt the United States Supreme Court's decision in the Brooke Group case as the law governing predatory pricing claims under Wis. Stat. §133.03.

The trial court's errors result in large part from applying recent federal case law that is unabashedly hostile to antitrust claims in general and to predatory pricing claims in particular. Because the intellectual underpinnings of that hostility have been seriously

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[92] Prestressed Concrete, Inc., v. Bladholm Bros. Culvert Co., 498 N.W. 2d 274, 279 (Minn. App. 1993)
[93] A-Ap. p. 143. (Report of Frank M. Gollop, Ph.D.).
[94] A-Ap. p. 169. (Report of Carl G. Degen).
[95] A-Ap. p. 145. (Report of Frank M. Gollop, Ph.D.).

called into question, and because such hostility contradicts Wisconsin public policy, this Court should reject Brook Group and its progeny.

a. Recent federal antitrust doctrine is too transitory to serve as a basis for analyzing predatory pricing claims under Chapter 133, Wis. Stats.

According to Professor Hovenkamp, "[c]ourts once believed that predatory pricing was easy for a well-financed firm to accomplish, and that it was a common means by which monopolies came into existence."[96] That traditional view is reflected in Professor Sullivan's Handbook of the Law of Antitrust, published by West in 1977:

> A firm which seeks to drive out or exclude rivals by selling at unremunerative prices will leave human traces; the very concept is one of a human animus bent, if you please, upon a course of conduct socially disapproved. If there is one task that judges and juries, informed through the adversary system, may really be good at, it is identifying the pernicious in human affairs. To contend that the conventional formulation, which looks, in a sense, for evil, ought to be amended to one which looks solely to an effect validated by economic studies is to assume too much about the precision of applied economics and to assume too little about the value of more humanistic modes of inquiry.[97]

Sometime during the sixteen years between 1977 and 1993, the traditional view fell by the wayside.

That such a revolution occurred is confirmed by one of its leaders, Robert Bork.[98] Judge Bork's The Antitrust Paradox: A Policy at War with Itself appeared in 1978 and was reissued in 1993. In a new introduction Judge Bork wrote:

> If what happened to antitrust [since the first edition of this book] amounts to a revolution in a major American policy, it may be useful to speculate about the causes. The

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[96] Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice 336 (1999).
[97] Lawrence Anthony Sullivan, Handbook of the Law of Antitrust 110 (1977).
[98] Judge Bork's role in the revolution was not merely scholarly. Having stepped down from the bench, he represented Brown & Williamson, the prevailing party in Brooke Group.

> decisive cause, of course, was a change in the composition of the Supreme Court. The justices who replaced much of the Warren Court's majority were not liberal ideologues and they had a better and more sympathetic understanding of the business world than did their predecessors They also had available to them a new, if still a minority, body of antitrust scholarship that made it easier to change the course of the law. . . .
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> The sea change in antitrust began at the law school of the University of Chicago. The books and articles that initiated the transformation were written by persons connected at one time or another with that law school and, to a lesser extent, with the university's business school and economics department . . . .
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> I mistakenly assumed that the statist and egalitarian doctrines the socialist impulse had created in the past were institutionalized and therefore immune to reform. New ideas could not change the Warren Court, but one of the great openings for reform was the fact of the mortality of justices. New justices might find new ideas congenial. In this instance, enough did.[99]

But the intellectual winds are shifting again. The Chicago School's exclusive focus on economic efficiency had long been criticized by more "humanistic" commentators who argued that the antitrust laws embody other values, as well.[100] These voices have now been joined by economists who argue that - - even on economic grounds - - Chicago School antitrust theory may have gotten some things wrong. Recent law review articles argue that predatory pricing (among other antitrust phenomena) may be more common than the Chicago School has persuaded the federal courts to believe. According to one such article:

> [S]ince Brooke was decided in 1993, no predatory pricing plaintiff has prevailed on the merits in the federal courts. At the same time modern economic analysis has developed

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[99] Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself x-xi, xiii-xiv (1993).
[100] See, e.g., L. Schwartz, "'Justice' and Other Non-Economic Goals of Antitrust," 127 U. Pa. L. Rev. 1076 (1979).

> coherent theories of predation that contravene earlier economic writing claiming that predatory pricing conduct is irrational. More than that, it is now the consensus view in modern economics that predatory pricing can be a successful and fully rational business strategy. In addition, several sophisticated empirical case studies have confirmed the use of predatory pricing strategies. The courts, however, have failed to incorporate the modern writing into judicial decisions, relying instead on earlier theory that is no longer generally accepted.[101]

The transitory nature of recent federal antitrust doctrine would be reason enough for this court not to take Brooke Group and its progeny as a dispositive gloss on predatory pricing claims brought under Chapter 133, Wis. Stats. There are other reasons, as well.

b. The application of dicta from Brooke Group creates an evidentiary burden that no plaintiff could ever meet.

Much of Brooke Group's power as a tool for summarily disposing of predatory pricing claims comes from this passage:

> The plaintiff must demonstrate that there is a likelihood [1] that the predatory scheme alleged would cause a rise in prices above a competitive level [2] that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.[102]

Clause #2, in particular, if taken seriously, creates an evidentiary burden that no plaintiff could ever meet. But here is what Areeda and Hovenkamp, "the nation's leading antitrust commentators",[103] have to say about Clause #2:

> The Brooke Court found insufficient proof to satisfy clause #1 of this formula and thus did not have occasion to consider whether clause #2 required proof not only of significantly supracompetitive prices, actual or prospective,

[101] Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, "Predatory Pricing: Strategic Theory and Legal Policy", 88 Geo. L.J. 2239, 2241 (2000).
[102] 509 U.S. at 227-228.
[103] Appeal Brief of Defendants-Respondents at 18.

> but also of their amount or duration. We doubt that the Court meant the latter, for such detailed accounting is both impossible in antitrust litigation and beyond any of the three rationales for considering recoupment.[104]

Areeda and Hovenkamp underline the anomalous nature of Clause #2's draconian evidentiary requirement in these comments, as well:

> Antitrust law's predatory pricing requirement goes much further than its structural requirements in other types of antitrust cases. For example, in cases alleging monopolization by improper patent infringement litigation, the law does not require a showing that the value of any anticipated monopoly exceeds the cost of maintaining the wrongful suit. Nor does attempt law assess such a requirement. Although all Sherman Act §2 cases require a "structural" showing that monopoly is plausible, only the law of predatory pricing exacts its much more strenuous "recoupment" requirement.[105]

Of course the effect of exacting this much more strenuous requirement has been to obliterate predatory pricing as an antitrust claim in the federal courts.

c. The federal courts' animus against predatory pricing claims is based on an alleged "consensus" which has been convincingly called into question.

Why did the Brooke Group Court enunciate (albeit in dicta) such a draconian standard and why did other federal courts embrace it with such apparent enthusiasm? The answer is bound up with the "antitrust revolution" we discussed earlier. Part of the Chicago School "consensus" was the view that "predatory pricing schemes are rarely tried, and even more rarely successful."[106] The U.S. Supreme Court expressed this view in the Matsushita case in 1986, citing "studies from the 1970's and earlier that embodied

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[104] Phillip E. Areeda & Herbert Hovenkamp, 3 Antitrust Law 322 (2d ed. 2002) (emphasis added).
[105] Id. at 296.
[106] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

the Chicago-School consensus."[107] Seven years later in Brooke Group, the "Court apparently viewed this consensus as a well-established conclusion: it flatly repeated the 'rarely tried... rarely successful' declaration, omitting citations or a reference to a 'consensus among commentators.'"[108] Given such a view, one can understand the judicial animus against predatory pricing claims. According to the "consensus," such claims are almost guaranteed to be specious so that all a predatory pricing lawsuit accomplishes is to waste resources in litigation and risk chilling legitimate price-cutting activity. One "solution" to this "problem" was proposed by then Professor Easterbrook: ban all predatory pricing claims.[109] Alternatively, erecting insurmountable procedural and evidentiary hurdles a la Brooke Group could accomplish the same objective.

What has happened is that "an economic theory has been transformed into a rule of law that may be invoked by the courts to usurp the traditional fact-finding role of the jury".[110] Such usurpation might be acceptable if the underlying economic theory - - the Chicago-School antitrust "consensus" - - were unassailable. It is obviously not unassailable. We have referred already to various criticisms and Professor Hovenkemp recently surveyed the intellectual landscape:

> The rhetoric of skepticism [regarding antitrust enforcement] in Chicago School analysis is based on numerous economic studies during the 1960's which found that practices once thought to be anticompetitive were really not so. But many of those studies are now dated, and some of their assumptions have been called into question. One detects a certain resistance among Chicago School antitrust scholars to new developments in economic theory

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[107] C. Scott Hemphill, "The Role of Recoupment in Predatory Pricing Analyses," 53 Stan. L. Rev. 1587, 1602 (2001).
[108] Id.
[109] Frank H. Easterbrook, "Predatory Strategies and Counterstrategies," 48 U. Chi. L. Rev. 263 (1981).
[110] David F. Shores, "Law, Facts and Market Realities in Antitrust Cases After Brooke and Kodak," 48 S.M.U. L. Rev. 1837, 1845 (1995).

> that undermine favorite Chicago School ideas.... Chicagoans are quick to cite to voluminous Chicago School scholarship that laid older anticompetitive theories to rest by substituting entirely competitive explanations. This writing revolutionized antitrust theory in such areas as resale price maintenance, tying arrangements and predatory pricing. But the last two decades have produced a mountain of Post-Chicago scholarship that has substantially changed the landscape again.[111]

d. Wisconsin public policy leaves no place for the radical approach to predatory pricing embraced by the federal courts.

There is another reason why this Court should reject the federal courts' hostile approach to antitrust issues in general and to predatory pricing claims in particular. Such hostility is blatantly inconsistent with well-established Wisconsin public policy. Here is what this Court said just a few years ago:

> The importance of the antitrust laws in preventing monopolies and encouraging competition, the fundamental economic policy of this state, is directly reflected in the statement of legislative intent in Sec. 133.01, Stats., and in the case law. The legislature commands in Sec. 133.01 that Ch. 133 be given the most liberal construction to achieve the aim of competition.[112]

> The Wisconsin legislature determined that private, civil antitrust suits are important methods of enforcing Ch. 133. To encourage private enforcement the legislature built incentives into the statute. These include tolling the statute of limitations under certain circumstances, allowing the cost of suit, including reasonable attorney fees, to prevailing claimants, awarding treble damages, and granting expedited treatment to civil antitrust actions in the courts. Under this legislative scheme, a private party 'performs the office of a private attorney general' when bringing a civil antitrust action and significantly

[111] Hovenkamp, supra note 98 at 63.
[112] Carlson & Erickson Builders v. Lampert Yards, Inc., 190 Wis.2d 650, 662, 529 N.W.2d 905 (1995). (emphasis added).

> supplements the government's limited resources for enforcing antitrust law.[113]
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> Thus, there is a 'longstanding policy of encouraging rigorous private enforcement of antitrust laws.' We must construe and apply the antitrust laws with the important role of private actions in mind. The court assumes that the legislature intended an interpretation that advances, not hinders, this purpose of the statute.[114]

Wisconsin's longstanding policy of liberally construing its antitrust laws and of encouraging private enforcement is 180 degrees removed from a federal doctrine that assumes certain anticompetitive practices simply don't exist and then places insurmountable barriers in front of plaintiffs who dare suggest otherwise.

4. If this Court returns to first principles it will conclude that there is a jury question regarding the Journal's conduct.

What should this Court do? It should reject the extremism of Brooke Group and similar cases and return to first principles. Yes, there is bound to be a tension in predatory pricing cases because, as a rule, antitrust law favors low prices. It is only when low prices today raise a plausible spectre of higher prices tomorrow that an antitrust claim should lie. Expert evidence can help answer two key questions: (1) Were the challenged prices "predatory," e.g., below a relevant measure of cost?; and (2) Is it likely the defendant will be able to raise its prices down the road?

As Areeda and Hovenkamp point out, in all other antitrust contexts the answer to the second question -- the "recoupment" question -- turns on how the market has been defined in the first place:

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[113] Id. at 663.
[114] Id. at 674.

> In defining the market, to be sure, we consider whether a hypothetical monopolist of that "market" could profitably raise prices significantly....[115]

If the relevant market has been correctly defined, then a firm that obtains a monopoly of that market can -- by definition -- raise its prices.[116]

The Freeman's expert Professor Gollop defined the relevant market as "daily paid newspaper subscriptions" in Waukesha County.[117] If that definition is correct, then once the Journal destroys the Freeman, the Journal will have a monopoly and will be able to raise its prices. The Journal disagrees with Professor Gollop's definition of the market, arguing that it includes other media that would constrain the Journal's pricing power. This is a jury question, although the great weight of authority supports Professor Gollop. One court has said:

> [T]he relevant product market for antitrust purposes is the local daily newspaper. The market is in fact two markets: one for readers and one for advertisers.... The weight of case authority confirms the court's almost intuitively correct definition of this market.... [T]he court notes that, in the future, it would probably make little sense for any party to relitigate this issue, given the amount of resources spent on an issue that has been resolved the very same way by every court that has considered it in any depth.[118]

Clearly, then, Professor Gollop's testimony would provide a basis for a reasonable jury to conclude that paid local daily newspapers in Waukesha County constitute the relevant market. Once the Journal destroys the Freeman, it will have a monopoly and will be able

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[115] Id. at 321 n. 106.

[116] Professor Franklin Fisher of MIT has put it this way: "[M]arket definition, if it is to be an aid in the analysis [of monopoly power], has to place in the relevant market those products and services and firms whose presence and actions can serve as a constraint on the policies of the alleged monopolist." Franklin M. Fisher, "Diagnosing Monopoly," The Quarterly Journal of Economics and Business, Summer 1979, p. 13.

[117] R.17 (Report of Frank M. Gollop, Ph.D., at p. 3).

[118] Community Publishers, Inc. v. Donrey Corp., 892 F.Supp. 1146, 1155, 1156, 1157 (1995) (emphasis added). The Donrey court specifically excluded from the definition of the relevant market national newspapers, weekly newspapers, "shoppers," radio, television, circulars and direct mail. Id. at 1155.

to raise prices unless new firms can enter. But, as Professor Gollop has opined, barriers to entry into the daily newspaper market are high. Once again, he is not alone in his opinion. According to the Donrey court, "[t]he barriers to entry [into the local daily newspaper market] are universally recognized as formidable,"[119] and any contention to the contrary is "specious."[120] Professor Gollop's testimony thus provides an adequate basis for a reasonable jury to conclude that once the Journal destroys the Freeman it will be able to "recoup" by raising the price of daily newspapers in Waukesha County.

B. THE TRIAL COURT'S POSITION ON THE CAUSATION ISSUE USURPS THE ROLE OF THE JURY AND RAISES INSURMOUNTABLE BARRIERS FOR PLAINTIFFS UNDER CHAPTER 133, DIRECTLY CONTRADICTING WISCONSIN LAW.

The trial court also held that summary judgment was appropriate because: (1) the Freeman cannot prove that the Journal's predatory conduct caused the Freeman's loss of subscribers; and (2) the Freeman cannot adequately "disaggregate" its damages.

The trial court's position on causation amounts to this: A defendant in an antitrust case under Chapter 133 is entitled to summary judgment -- regardless of its predatory conduct -- unless the plaintiff can rule out, or else quantify precisely, every force in the universe that might have contributed to the plaintiff's injury. Such an extremist view of the plaintiff's burden is inconsistent with Wisconsin law and policy.

Wisconsin "causation" law is established and clear. A defendant's conduct is a cause of a plaintiff's loss if that conduct was a "substantial factor" in bringing about the loss.[121] The phrase "substantial factor" "denotes that the defendant's conduct had such an

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[119] 892 F.Supp. at 1168.
[120] Id.
[121] Or, in the tort context, a substantial factor in producing the injury. See WI JI – Civil 1500; Merco Distrib. Corp. v. Commercial Police Alarm, 84 Wis. 2d 455, 458-59, 267 N.W. 2d 652 (1978).

effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense."[122] Wisconsin's standard jury instruction on "cause" emphasizes that juries are not asked to find that the defendant's conduct was "the cause", but rather "a cause", since an injury may have more than one cause.[123] Whether in a particular case the defendant's unlawful conduct was a substantial factor in bringing about the plaintiff's harm is a question of fact for the jury.[124]

In Wills v. Regan, this Court stated:

> [I]f the inferences to be drawn from the credible evidence are doubtful and uncertain, and there is any credible evidence which under any reasonable view will support or admit of an inference either for or against the claim or contention of any party, then the rule that the proper inference to be drawn therefrom is for the jury should be firmly adhered to and the court should not assume to answer such question....[125]

The Wills court went on to say:

> Prosser, Law of Torts (2d ed.), p. 291, Sec. 50, states that "where reasonable men could not differ as to whether the defendant's conduct was, or was not, a substantial factor in producing the result, the determination of the question of causation is for the court; but in cases where reasonable men might differ -- which will include all but a few of the cases in which the issue is in dispute at all -- the question is one for the jury."[126]

That is the rule. And the evidence here is that over the period in question, the Freeman's circulation levels were dependent upon whether the Journal was giving away free newspapers. The most salient facts are these:

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[122] Id.
[123] Id.
[124] Id. at 459.
[125] Wills v. Regan 58 Wis. 2d 328, 339, 206 N.W. 2d 398 (1973), quoting from Weber v. Walters, 268 Wis. 2d 251, 255, 67 N.W. 2d 395, 397 (1954) (emphasis added).
[126] Id. at 340, quoting Jeffers v. Peoria-Rockford Bus. Co., 274 Wis. 594, 603, 80 N.W. 2d 785, 790 (1957).

- In the 10-year period leading up to 1996, the Freeman's circulation had been relatively constant, consistently hovering around 22,000 subscribers.

- In 1996, the Journal, which already had a monopoly on Sunday newspapers in Waukesha County and a dominant share of the daily newspaper market, launched an "aggressive campaign" "to switch readers/advertisers from the Freeman."

- As part of its self-described "aggressive campaign" the Journal launched its Sunday-daily conversion program. Under that program, the Journal offered Sunday-only subscribers the daily Journal for 3 months, 6 months, and even a year at no out-of-pocket cost to the subscriber.

- Over the 1996-2000 period during which the Journal pursued its Sunday-daily conversion giveaway, the Freeman lost 25% of its subscriber base.

- In 1998, the only year between 1996 and 2000 when the Journal did not employ its predatory conversion program, the Freeman gained subscribers.

On the basis of this evidence alone, a jury could readily find that the Journal's practice of giving away free daily newspapers caused the Freeman to lose subscribers. Moreover, the Journal's own marketing documents specifically attest to its goal of using the conversion program to "convert Freeman subscribers to Journal Sentinel subscribers."[127] The program was a substantial factor in doing just that. Might other causes have contributed to the Freeman's precipitous decline between 1995 and 2000? The Freeman and the Journal disagree about that. But clearly this is a case "where reasonable men might differ," and consequently the question of causation is for the jury.

Moreover, the leading Wisconsin case on the burden of proof in a Chapter 133 case demonstrates that Wisconsin policy -- contrary to recent federal doctrine -- is to

[127] R.27:Ex.I (Journal 1997 Marketing Plan, p. 10139).

lighten the plaintiff's burden in antitrust cases, not make it heavier. In Carlson & Erickson Builders v. Lampert Yards, Inc., the Court of Appeals held that the "middle burden" of proof should apply in a civil action under Chapter 133. This Court reversed, holding that the less demanding "ordinary burden" was appropriate:

> Thus, there is a 'longstanding policy of encouraging rigorous private enforcement of antitrust laws.' We must construe and apply the antitrust laws with the important role of private actions in mind. The court assumes that the legislature intended an interpretation that advances, not hinders, this purpose of the statute.[128]

In the face of this clearly articulated policy, and in the face of a traditional procedural rule that where reasonable people might differ as to the cause of a plaintiff's injury the question is for the jury, the trial court erred in granting summary judgment for the Journal, and finding that "this Court is wholly without a factual basis by way of this record as to the causation issue."[129]

The trial court apparently believed that the evidence adduced by the Freeman established only a "mere possibility" of causation and that the matter remained "one of pure speculation or conjecture." Under this reasoning, for a plaintiff under Chapter 133 to get beyond "pure speculation or conjecture" he or she must disprove all other possible explanations besides the defendant's unlawful conduct:

> [I]n no way, shape, fashion or form has anyone come forward on behalf of [The Freeman] to describe the market conditions, the management styles, the programs that were offered ....[130]

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[128] Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc., 190 Wis.2d 650, 674, 525 N.W.2d 905 (1995).
[129] A-Ap. p. 137. (J. Hassin Oral Decision).
[130] A-Ap. p. 138. (J. Hassin Oral Decision).

Once again, we say, a plaintiff under Chapter 133 has no such burden in order to survive summary judgment on "causation." According to Prosser:

> The plaintiff need not negative entirely the possibility that the defendant's conduct was not a cause, and it is enough to introduce evidence from which reasonable persons may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no one can say with mathematical certainty what would have occurred if the defendant had acted otherwise. Proof of what we call the relation of cause and effect, that of necessary antecedent and inevitable consequence, can be nothing more than "the projection of our habit of expecting certain consequents to follow merely because we had observed these sequences on previous occasions." If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists.[131]

As a matter of ordinary experience would the fact that one firm (the Journal) gave away a product that another firm (the Freeman) was selling, be expected under the circumstances to produce a decline (indeed a precipitous decline) in the second firm's business? The answer is obvious. And because the result, a decline in the Freeman's subscriber base, did in fact follow, the conclusion is permissible that the causal relation exists.

Like all other business torts committed by one Wisconsin business against another, an antitrust plaintiff need only show unlawful activity that constitutes a substantial factor in producing damages. The trial court was manifestly in error when it granted summary judgment for the Journal on the causation issue.

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[131] Prosser and Keeton on Torts, 5th Ed. (Hornbook Series) §41, pp. 269-70. (Footnotes omitted.) (Emphasis added.)

C. THE FREEMAN IS NOT REQUIRED TO "DISAGGREGATE" ITS DAMAGES.

1. The trial court erred in applying the federal "disaggregation" doctrine because it is contrary to Wisconsin law and policy.

The trial court also relied on the federal "disaggregation" doctrine in granting summary judgment for the Journal.[132] This antitrust doctrine was developed by the Second Circuit in Berkey Photo, Inc. v. Eastman Kodak Co.[133] The doctrine requires the plaintiff to offer specific evidence as to what portion of its injury was caused by the defendant's unlawful conduct and what portion was caused by other factors. The doctrine has been criticized; the Third Circuit rejected it in Bonjorno v. Kaiser Aluminum & Chem. Corp.[134] One commentator has argued that "[t]he disaggregation requirement suffers from two conceptual defects, each a separate ground for rejecting the rule."[135] One of those defects is that "the [disaggregation] rule would virtually eliminate all potential plaintiffs in monopolization actions."[136]

Here, the trial court relied on a single federal case -- MCI v. AT&T, 708 F.2d 1081 (7th Cir. 1983) -- to apply the disaggregation requirement. The court's application of the doctrine flies in the face of well-established Wisconsin law and policy. In the process, it raises insurmountable barriers for private antitrust plaintiffs.

As noted earlier, a Wisconsin plaintiff proves causation by showing that the defendant's conduct was "a substantial factor" in causing an injury. Moreover, as the Court of Appeals stated in the Reiman case:

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[132] A-Ap. pp. 134-136. (J. Hassin Oral Decision).
[133] 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).
[134] 752 F.2d 802 (3d Cir. 1984), cert. denied, 106 S.Ct. 3284 (1986).
[135] James R. McCall, "The Disaggregation of Damages Requirement in Private Monopolization Actions", 62 Notre Dame L.Rev. 643, 668 (1987).
[136] Id. (Emphasis Added.)

> In all cases involving problems of causation and responsibility for harm, a good many factors may have united in producing the result; the plaintiff's total injury may have been the result of many factors in addition to the defendant's tort or breach of contract. Must the defendant pay damages equivalent to the total harm suffered? Generally the answer is Yes, even though there were contributing factors other than his own conduct. Must the plaintiff show the proportionate part played by the defendant's breach of contract among all the contributing factors causing the injury, and must his loss be segregated proportionately? To these questions the answer is generally No. In order to establish liability the plaintiff must show that the defendant's breach was "a substantial factor" in causing the injury. (citation omitted).[137]

Thus, Wisconsin law does not require the Freeman to "segregate proportionately" (i.e. "disaggregate") its damages. The Freeman is not required to separate out the injuries caused by the Journal's anti-competitive subscription scheme as opposed to injury resulting from alternative causes. So long as the Journal's conduct is a cause of the Freeman's injury -- a "substantial factor" in that injury --the Journal is liable for the total harm suffered.

Moreover, the application of Wisconsin's traditional standard regarding causation of damages (as opposed to the draconian, monopolist-friendly "disaggregation" concept applied by some federal courts and the court below), is consistent with the legislature's command in §133 that the statute be given "the most liberal construction to achieve the aim of competition."[138] It is also consistent with Wisconsin's "longstanding policy of encouraging rigorous private enforcement of antitrust laws."[139]

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[137] Reiman Assoc., Inc. v. R/A Advertising, Inc., 102 Wis.2d 305, 321, 306 N.W.2d 292, 301 (Ct. App. 1981)(emphasis added).
[138] Carlson & Erickson, 190 Wis.2d at 662, 529 N.W.2d at 909.
[139] Id. at 663.

2. Even if federal "disaggregation" doctrine applies, the Freeman complied with its requirements, apportioning damages among the types of alleged anticompetitive conduct.

Disaggregation has been required by some federal courts when an antitrust plaintiff alleges more than one antitrust violation. In those cases, the jury may find liability for certain conduct but not for other conduct. When that happens, if the plaintiff's damages evidence is overly aggregated it may be unduly difficult to assign damages only for the conduct that was found to be unlawful.

The MCI case is a perfect example of the problem.[140] In that case, MCI had asserted twenty-two separate counts of monopolization against AT&T, of which seven were dismissed on summary judgment. The jury found liability on ten of the remaining fifteen counts and awarded MCI $600 million in damages (before trebling). On appeal, AT&T argued that MCI's damage proof was invalid because it "assumed that all twenty-two of AT&T's acts charged were illegal."[141] The Seventh Circuit agreed, finding that "the jury was left with no way to adjust the amount of damages to reflect lawful competition from AT&T."[142]

A similar thought was expressed by the Second Circuit in Litton Sys., Inc. v. AT&T.[143] There the court observed that "damage studies are inadequate when only some of the conduct complained of is found to be wrongful and the damage study cannot be disaggregated."[144]

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[140] MCI v. AT&T, 708 F.2d 1081, (7th Cir. 1983).
[141] Id. at 1163.
[142] Id.
[143] 700 F.2d 785 (2nd Cir. 1983)
[144] Id. at 825.

The damages reports prepared by the Freeman's experts readily permit disaggregation in the sense just indicated. The Freeman complained of only two anticompetitive practices by the Journal. One was exclusionary conduct involving advertising contracts. The Freeman's expert, Carl Degen, estimated the Freeman's losses due to the anticompetitive advertising conduct at $600,667.00. That allegation was dismissed and is no longer at issue.

The second anticompetitive practice is the predatory Sunday--daily conversion program. Carl Degen's analysis estimates lost subscription profit at $813,091.00 and lost advertising revenue profit attributable to the decline in subscriptions at $747,254.00. The Freeman's other damages expert puts the reduction in the Freeman's enterprise value due to its loss of circulation at $3,853,067.00.

Thus, the Freeman's expert reports disaggregated damages by distinguishing between the two types of anticompetitive conduct alleged. They have already separated-out damages caused by the Sunday-daily conversion program. To the extent the Journal succeeds in convincing the jury that those damages were caused in part by other factors, the jury can make the same kinds of adjustments it would make in any other business tort case.

V. CONCLUSION

The trial court erred when it held that there was no genuine issue of material fact as to whether the Journal engaged in predatory pricing; when it held that there was no genuine issue of material fact as to whether the Journal's conduct injured the Waukesha Freeman; and when it held that a plaintiff under Chapter 133 must satisfy the "disaggregation" doctrine in order to avoid summary judgment. This Court should reverse the trial court on these issues and remand the case for trial on the merits.

Dated this 28th day of October, 2002.

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CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced using a proportional serif font. The length of this brief is 10,541 words.

Dated this 28th day of October, 2002.

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APPENDIX

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September 26, 2002

To:

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You are hereby notified that the Court has entered the following order:

No. 01-3128 Conley Publishing Group Ltd. v. Journal Communications, Inc.
L.C.#00CV222

The court having considered the court of appeals' request pursuant to Wis. Stat. § (Rule) 809.61 that this court accept the certification of this appeal;

IT IS ORDERED the certification is granted and the appeal is accepted for consideration of all issues raised before the court of appeals. When this court grants direct review upon certification, it acquires jurisdiction of the case, Wis. Const. art. VII, § 3(3), that is, the entire appeal, which includes all issues, not merely the issues certified or the issue for which the court accepts the certification. State v. Stoehr, 134 Wis. 2d 66, 70, 396 N.W.2d 177 (1986); Wis. Stat. §§ 808.05(2) and (Rule) 809.61. Further, the court has jurisdiction over issues not certified because the court may review an issue directly on its own motion. Wis. Stat. § 808.05(3); and

IT IS FURTHER ORDERED that within 30 days after the date of this order the appellant must file either a brief in this court or a statement that no brief will be filed; that within 20 days thereafter the respondent must file either a brief or a statement that no brief will be filed; and that

(Continued on Page Two)

if a brief is filed by the respondent, within 10 days thereafter the appellant must file either a reply brief or a statement that no reply brief will be filed; and

IT IS FURTHER ORDERED that in any brief filed in this court the parties shall not incorporate by reference any portion of their court of appeals' brief; instead, any material upon which there is reliance should be restated in the brief filed in this court; and

IT IS FURTHER ORDERED that in the event any party elects not to file a brief in this court, the briefs previously submitted by that party to the court of appeals shall stand as that party's brief in the Supreme Court; and

IT IS FURTHER ORDERED that within the time period established for the filing of briefs, each party must provide the clerk of this court with copies of the briefs previously filed on behalf of that party in the court of appeals. If a party elects to file a new brief(s), 10 copies of their court of appeals brief(s) must be provided. If a party elects to stand on their court of appeals brief(s), 17 copies of each of their court of appeals brief(s) must be provided.

IT IS FURTHER ORDERED that the parties shall be notified of the date and time for oral argument in this appeal in due course.

Cornelia G. Clark
Clerk of Supreme Court

Appeal No. 01-3128 Cir. Ct. No. 00-CV-222

WISCONSIN COURT OF APPEALS
DISTRICT II

CONLEY PUBLISHING GROUP LTD., FREEMAN NEWSPAPERS LLC AND LAKESHORE NEWSPAPERS, INC.,

PLAINTIFFS-APPELLANTS,

V.

JOURNAL COMMUNICATIONS, INC., AND JOURNAL SENTINEL, INC.,

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Nettesheim, P.J., Brown and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

1. Whether the United States Supreme Court decision in ***Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.***, 509 U.S. 209 (1993), should be adopted as the law in Wisconsin governing predatory pricing practices in violation of WIS. STAT. § 133.03 (1999-2000),[1] Wisconsin's Sherman Anti-Trust Act.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

2. Whether the more stringent federal rule governing the admissibility of expert opinion testimony set forth in ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993), affects the applicability of ***Brooke Group*** to Wisconsin law.

3. Whether Wisconsin's predatory pricing law requires a plaintiff to "disaggregate" its damages in order to survive summary judgment.

FACTS

Conley Publishing Group Ltd., the publisher of the *Waukesha Freeman* (the Freeman), filed this action against Journal Communications, Inc., and Journal Sentinel, Inc., the publisher of the *Milwaukee Journal/Sentinel* (the Journal). Relevant to the issues on appeal, the Freeman alleged in its second amended complaint that the Journal had engaged in an attempt to monopolize the market for readership of daily newspapers in Waukesha county in violation of Wisconsin's Sherman Anti-Trust Act, WIS. STAT. § 133.03. The trial court dismissed the Freeman's complaint at summary judgment.

We take the facts from the summary judgment record. Conley Publishing purchased the Freeman in May 1997. The Freeman, which was established in 1859, issues a paid daily newspaper (distributed Monday through Saturday) to residents of Waukesha county. It does not publish a paid Sunday newspaper.

The Freeman's only daily competitor in the Waukesha county market is the Journal, which publishes a daily newspaper and a Sunday newspaper. The Journal's daily newspaper is the only local paid daily newspaper in Milwaukee county. Its Sunday newspaper is the only local paid Sunday

newspaper in Milwaukee, Waukesha, Ozaukee and Washington counties. In Waukesha county, the Journal has controlled roughly 78% of the daily newspaper readership market while the Freeman has controlled roughly 22%.

The Freeman alleges that beginning in mid-1996, the Journal began targeting the Freeman subscribers by offering a "Sunday-daily conversion" program. This conversion program, which is the subject of the Freeman's appeal, operated as follows. The Journal hired an outside marketing company to contact residents of Waukesha county who subscribed to the Sunday Journal but not to the daily Journal. The Journal offered those subscribers the opportunity to receive the daily Journal at no additional cost for the remainder of their Sunday Journal contract provided they shorten the length of their Sunday subscription terms. According to a Journal telemarketing transcript submitted at summary judgment, the Journal would offer a fifty-two week Sunday only subscriber forty-nine weeks of the daily Journal by agreeing to shorten the Sunday subscription term to forty-nine weeks as well. The Journal's 1997 Marketing Plan expressly states its plan to "target non-subscribers within [Waukesha] zip codes 53183, 53186, and 53188, which will include the majority of remaining Freeman subscribers."

An affidavit of the Freeman's publisher, Jeffrey Hovind, summarizes the Freeman circulation levels from 1996 to present. He states that for the ten years prior to 1996, the Waukesha Freeman's circulation remained relatively constant at around 22,000 subscribers. At the beginning of 1996, the Freeman had 21,424 subscribers. By the end of 1997, its circulation had declined to 17,466. During 1998, the only year the Journal did not offer a Sunday conversion program, the Freeman gained subscribers. The Freeman presently has a circulation of approximately 15,900 subscribers.

The result of the Freeman's decline in circulation was a decline in advertising revenue. The Freeman quantifies these losses as approximately $1,108,800 from the time it acquired the Freeman in 1997 until the present.

The Freeman alleged that the Journal's Sunday-daily conversion program constituted predatory pricing that will eventually allow the Journal to monopolize the daily newspaper market in Waukesha county. The Freeman engaged an expert, Dr. Frank Gollop, who determined that both requirements of a predatory pricing scheme are present: (1) the Journal was supplying daily papers to Waukesha county subscribers for less than the relevant measure of cost and (2) once the Journal drives the Freeman out of business it will have a monopoly in Waukesha county and will be able to recoup.

The Journal requested summary judgment on grounds that the Freeman had failed to offer sufficient evidence and expert testimony to support its antitrust claims and had failed to segregate its damages relating to those claims as required by antitrust laws. Specifically, the Journal argued that Gollop had failed to consider whether increased circulation and advertising revenue streams could exceed the "costs" of the Sunday-daily conversion program. However, at his deposition, Gollop testified that he had concluded that the advertising discounts also involved a sale below costs and, therefore, constituted predatory pricing.

As to damages, the Journal argued that the Freeman's damages expert, Carl G. Degen, erred in basing his calculations of declining Freeman subscriptions solely on the Journal's Sunday-daily conversion program. The Journal pointed to several other factors which could have contributed to the Freeman's declining circulation, including a nationwide decrease in afternoon newspaper circulations, the Freeman's increased subscription prices as of 1995

and reduced number of discounts, and the turnover in senior management when the Freeman was sold to Conley Publishing in 1997.

The trial court granted the Journal's motion for summary judgment based on its determination that the Freeman had failed to provide sufficient evidence (1) to support its predatory pricing claim, (2) to support a finding on the amount of damages attributable to the Journal's alleged antitrust behavior, and (3) to support a finding that the Journal's conduct resulted in the Freeman's loss or injury. The Freeman appeals.

DISCUSSION

1. Predatory Pricing Law and Brooke Group

The Freeman's allegations amount to a predatory pricing claim under WIS. STAT. § 133.03(2), which is modeled after 15 U.S.C. § 2 (2001), the federal Sherman Anti-Trust Act. Section 133.03(2) provides:

> Every person who monopolizes, or attempts to monopolize, or combines or conspires with any other person or persons to monopolize any part of trade or commerce may be fined not more than $100,000 if a corporation, or, if any other person, may be fined not more than $50,000 or imprisoned for not more than 7 years and 6 months or both.

We are not aware of, nor have the parties cited to, any Wisconsin law governing predatory pricing claims under WIS. STAT. § 133.03(2). However, we recognize Wisconsin's policy of conforming our antitrust decisions to those of the United States Supreme Court. ***Prentice v. Title Ins. Co. of Minn.***, 176 Wis. 2d 714, 724, 500 N.W.2d 658 (1993). The seminal case addressing predatory pricing at the federal level is ***Brooke Group***.

A predatory pricing claim arises when a "business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." ***Brooke Group***, 509 U.S. at 209. In order to succeed on a claim of predatory pricing, a plaintiff must prove (1) that the defendant's prices are below an appropriate measure of its rival's costs and (2) that the defendant had a reasonable prospect of recouping its investment in below-cost prices. ***Id.*** at 222, 224. To demonstrate a reasonable prospect of recoupment, the plaintiff must demonstrate that there is a likelihood that the scheme alleged would cause a rise in prices above a competitive level sufficient to compensate for the amounts expended on predation, including the time value of the money invested in it. ***Id.*** at 225.

The Journal relies on the two elements set forth in ***Brooke Group*** in support of its argument that the Freeman has failed to make a prima facie case of predatory pricing. While the first element of a predatory pricing claim existed prior to the ***Brooke Group*** decision, the recoupment element was added by that decision, thereby establishing a new framework for predatory pricing analysis. The Court stated in ***Brooke Group***:

> As we have said in the Sherman Act context, "predatory pricing schemes are rarely tried, and even more rarely successful," [***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 574, 589 (1986)], and the costs of an erroneous finding of liability are high. "[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition ... mistaken inferences ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"

Brooke Group, 509 U.S. at 226-27. The result of the Supreme Court's decision in ***Brooke Group*** has been to make rare the litigation of predatory pricing claims.

The requirements of the ***Brooke Group*** decision have been subject to criticism in recent years, raising a question as to whether it provides the proper benchmark for Wisconsin predatory pricing law. Seven years post-***Brooke Group***, commentators observed:

> Predatory pricing poses a dilemma that has perplexed and intrigued the antitrust community for many years. On one hand, history and economic theory teach that predatory pricing can be an instrument of abuse; on the other hand, price reductions are the hallmark of competition and the tangible benefit that consumers perhaps most desire from the economic system.
>
> The dilemma is intensified by recent legal and economic developments. Judicial enforcement is at a low level following the Supreme Court's most important predatory pricing decision in modern times [***Brooke Group***]. Indeed, since Brooke was decided in 1993, no predatory pricing plaintiff has prevailed on the merits in the federal courts.

Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2241 (2000). The article goes on to note that while ***Brooke Group*** was decided at a time when predatory pricing conduct was thought to be irrational, the consensus view in modern economics is that predatory pricing can be a successful and fully rational business strategy—a development that the courts have "failed to incorporate ... into [modern] judicial decisions, relying instead on earlier theory that is no longer generally accepted." Bolton, *supra* at 2241.

Specifically, it is ***Brooke Group***'s addition of the "recoupment" element of a predatory pricing claim that renders it nearly impossible to succeed on a predatory pricing claim. ***Brooke Group*** instructs that proof of recoupment requires a showing that (1) the scheme alleged would cause a rise in prices above a competitive level and (2) that such a rise would be sufficient to compensate for the

amounts expended on predation, including the time value of the money invested in it. ***Brooke Group***, 509 U.S. at 225.

Leading antitrust commentators have observed that the proof necessary to establish the second clause of recoupment has yet to be determined. PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3 ANTITRUST LAW 274, ¶726d4 (rev. ed. 1996). ***Brooke Group*** did not reach the issue of whether it requires proof not only of significantly supracompetitive prices, actual or prospective, but also of the amount and duration of that pricing. AREEDA & HOVENKAMP, *supra* at 274, ¶726d4. If, however, proof of amount and duration were required, it would be impossible to produce such detailed accounting. ***Id.*** Regardless, commentators have noted that the stringency of the recoupment requirement goes well beyond that required in other areas of antitrust law—"only the law of predatory pricing exacts its much more strenuous 'recoupment' requirement." ***Id.*** at 247, ¶725a1B.[2]

Noting the criticism of ***Brooke Group*** and the near impossibility of surviving summary judgment with a claim of predatory pricing, the Freeman urges this court to follow pre-***Brooke Group*** law, which requires only a showing that the competitor is selling below cost.

We certify this issue not only because there is no law in Wisconsin governing a claim of predatory pricing under WIS. STAT. § 133.03, but also because of the recent criticism of ***Brooke Group*** and the apparent impossibility of maintaining a claim of predatory pricing under its requirements. We believe that

[2] We note that the recoupment approach may be favored in cases in which, as here, the relevant market consists of a predator who is driving out its only rival—thus having a recoupment market share of 100%—and the market has a low elasticity of demand. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3 ANTITRUST LAW 249, ¶725b (rev. ed. 1996).

our supreme court should determine the direction of Wisconsin law given the important policies underlying claims of predatory pricing and the equally important policies of protecting competition.

2. Brooke Group and the Trial Court's Role at Summary Judgment

The trial court found at summary judgment that the Freeman's expert, Gollop, failed to provide sufficient evidence as to (1) "the material issue of whether or not the total advertising revenue ... [a]s folded into the price of the paper is below the cost to either the Journal or its competitor [the Freeman]," (2) whether "this particular newspaper as sold by the Journal under this particular arrangement is anything less than the rival cost of the Waukesha Freeman," and (3) the "probability as to what the costs of the Journal are respecting its investment in ... below cost pricing." The court further determined that the Freeman had failed to show (1) that the Journal would at some future date be charging higher prices for its paper, (2) that the Journal has or will suffer a loss as a result of the Sunday-daily conversion program, and (3) what amount the Journal will need to recoup for its losses.

The Freeman challenges the trial court's grant of summary judgment on grounds that the trial court usurped the function of the jury by weighing conflicting expert testimony regarding recoupment. The Freeman argues that Gollop's testimony was sufficient to raise a genuine issue of material fact as to whether the Journal's Sunday-daily conversion program involved a price below the relevant measure of cost. The Freeman argues that "in Wisconsin, when qualified experts disagree, summary judgment is not appropriate."

The Journal relies heavily on ***American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.***, 135 F. Supp. 2d 1031 (N.D. Cal. 2001), in support of its

argument that the trial court may grant summary judgment based on its determination that an expert's opinion is inadequate as a matter of law. There, the plaintiffs alleged a violation of the Robinson-Patman Act by the defendants. ***Id.*** at 1035. The court granted summary judgment in favor of the defendants after concluding that the expert's model of damages contained "entirely too many assumptions and simplifications that are not supported by real-world evidence. As a result, its conclusions that the discounts defendants received caused actual injury to the individual plaintiffs, and the amount of damages caused by that injury, are entirely too speculative to support a jury verdict." ***Id.*** at 1041-42.

However, the role of the Wisconsin trial court in evaluating expert testimony differs from that of the federal court. This difference was recently discussed in ***Green v. Smith & Nephew AHP, Inc.***, 2000 WI App 192, ¶21, 238 Wis. 2d 477, 617 N.W.2d 881, *aff'd*, 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727:

> Unlike in the federal system, where the trial court has a significant "gatekeeper" function in keeping from the jury expert testimony that is not reliable, *see, e.g.*, ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579 (1993) (scientific expert testimony); ***Kumho Tire Co. v. Carmichael***, [526 U.S. 137] (1999) (expert testimony in general), the trial court's gatekeeper role in Wisconsin is extremely limited[.]

In Wisconsin, the witness must be first qualified as an expert under WIS. STAT. § 907.02 before he or she can give any opinion within the asserted area of expertise. ***Green***, 2000 WI App 192 at ¶21. "Once the relevancy of the evidence is established and the witness is qualified as an expert, *the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment.*" ***State v. Peters***, 192 Wis. 2d 674, 690, 534 N.W.2d 867 (Ct. App.

1995) (emphasis added). Where, as here, the parties do not dispute the expert's qualifications or the relevancy of the testimony, Wisconsin law appears to favor leaving the reliability issues to the jury.

We certify this issue because federal antitrust case law invokes the ***Daubert*** "gatekeeper" role of the trial court regarding expert testimony, and our supreme court has instructed the courts of this state to conform Wisconsin antitrust law to federal law. ***Prentice***, 176 Wis. 2d at 724. Yet, at the same time, Wisconsin does not operate under the ***Daubert*** rule. ***Green***, 2000 WI App 192 at ¶21. We believe that the supreme court is the proper judicial forum to resolve the tension between these two principles. In addition, the case presents the supreme court with the opportunity (or perhaps necessity) of revisiting the Wisconsin rejection of the trial court's "gatekeeper" function under ***Daubert***. The supreme court may choose to do so either on a broad scale or on a limited basis in antitrust cases.

3. "Disaggregation" of Damages

Finally, the Freeman challenges the trial court's reliance on the "disaggregation" of damages doctrine in granting summary judgment. As to proof of damages, the trial court held, pursuant to ***MCI Communications Corp. v. American Telegraph and Telephone Co.***, 708 F.2d 1081 (7th Cir. 1983), that there must be a disaggregation of damages in order to survive a motion for summary judgment. The court noted that the Freeman's expert had indicated a significant loss of revenue as a result of lost subscriptions and advertising dollars due to the Journal's anticompetitive conduct. However, the trial court determined that the Freeman's expert had made no effort to disaggregate the damages so as to raise a factual dispute as to what portion of damages was attributable to

anticompetitive behavior as opposed to other factors such as poor business decisions made by the Freeman.

In ***MCI Communications***, the court stated: "When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. This is precisely the type of 'speculation or guesswork' not permitted for antitrust jury verdicts." ***Id.*** at 1162.

The Freeman relies on ***Reiman Associates, Inc. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 322, 306 N.W.2d 292 (Ct. App. 1981), for the proposition that, under Wisconsin law, a plaintiff may prove causation if it shows that the defendant's conduct was a "substantial factor" in causing injury.

> In all cases involving problems of causation and responsibility for harm, a good many factors may have united in producing the result; the plaintiff's total injury may have been the result of many factors in addition to the defendant's tort or breach of contract. Must the defendant pay damages equivalent to the total harm suffered? Generally the answer is Yes, even though there were contributing factors other than his own conduct. Must the plaintiff show the proportionate part played by the defendant's breach of contract among all contributing factors causing the injury, and must his loss be segregated proportionately? To these questions the answer is generally No.

Id. (citation omitted). The Freeman contends that Wisconsin law does not require it to disaggregate its damages by separating out those caused by anticompetitive behavior and those resulting from other factors. The Freeman argues that a more stringent requirement would run contrary to Wisconsin's policy that WIS. STAT. § 133.03 is to be given "the most liberal construction to achieve the aim of

competition." ***Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.***, 190 Wis. 2d 650, 662, 529 N.W.2d 905 (1995); WIS. STAT. § 133.01.

We certify this issue because there is no law governing the allocation of damages in a predatory pricing action under WIS. STAT. § 133.03. While we agree with the Journal that the Freeman cannot recover unless there is a causal connection between the conduct and the injury and an actual loss or damage as a result of the injury, *see* ***Martindale v. Ripp***, 2001 WI 113, ¶33, 246 Wis. 2d 67, 629 N.W.2d 698, it remains unclear whether the damages must be disaggregated once a causal connection and actual loss are established.

CONCLUSION

We have precious few Wisconsin appellate decisions addressing the Wisconsin antitrust statute. More importantly, we have no Wisconsin predatory pricing cases. All of the questions we certify raise issues of first impression which will chart new law under Wisconsin's antitrust statute. We respectfully ask the supreme court to accept jurisdiction over this case.

COPY

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

CONLEY PUBLISHING GROUP LTD., FREEMAN NEWSPAPERS LLC, and LAKESHORE NEWSPAPERS, INC.

Plaintiffs,

JOURNAL COMMUNICATIONS, INC., and JOURNAL SENTINEL INC.

Defendants.

FILED
IN CIRCUIT COURT
OCT 12 2001
WAUKESHA CO. WIS.
CIVIL DIVISION

Case No. 00-CV-222
Honorable Donald Hassin

ORDER FOR DISMISSAL AND JUDGMENT AND JUDGMENT

ORDER FOR DISMISSAL AND JUDGMENT

Defendants moved the Court, pursuant to § 802.08, Stats., for summary judgment dismissing all counts. The Court heard the motions on August 3, 2001, and decided the motions on October 2, 2001. Plaintiffs appeared by W. Stuart Parsons, Brian D. Winters (August 3, 2001 only) and David R. Olson (October 2, 2001 only). Defendants appeared by John R. Dawson and Michael D. Fischer.

For the reasons stated by the Court in its oral decision of October 2, 2001, which are incorporated herein by reference,

IT IS ORDERED:

1. Defendants' motions for summary judgment are granted in their entirety.

2. Plaintiffs' action is dismissed, on the merits, with prejudice.

Dated this 12th day of October, 2001.

BY THE COURT:

s/ Donald J. Hassin Jr

Honorable Donald Hassin
Circuit Court Judge

JUDGMENT

Based on the Court's Order for Dismissal and Judgment dated October 12 2001:

IT IS ADJUDGED that the claims of plaintiffs Conley Publishing Group Ltd., Freeman Newspapers LLC, and Lakeshore Newspaper, Inc., against defendants Journal Communications, Inc. and Journal Sentinel Inc. are dismissed, on the merits, with prejudice.

Dated this 12 day of October, 2001.

BY THE COURT:

Carolyn T Iverson
By Susan Van Abel
Deputy

State of Wisconsin : Circuit Court : Waukesha County

CONLEY PUBLISHING GROUP LTD., et al.,

Plaintiff,

-VS- Case No. 00-CV-000222

JOURNAL COMMUNICATIONS,

Defendant.

October 2, 2001 Honorable Donald J. Hassin, Jr.

Circuit Judge, presiding

ORAL RULING

APPEARANCES:

STUART PARSONS and DAVID PAULSON, Attorneys at Law, appeared on behalf of the Plaintiff.

JOHN R. DAWSON and MICHAEL FISCHER, Attorneys at Law, appeared on behalf of the Defendant.

Lori J. Boyer, Official Reporter

TRANSCRIPT OF PROCEEDINGS

THE COURT: In the matter of Conley v. the Journal and with the consent of the parties, we'll go ahead and get started.

Firstly, appearing on behalf of the Plaintiff, Mr. Stuart Parsons and David Paulson.

My continuing apologies for our disastrous ceiling tile the last time you were here, Mr. Parsons. You've noted it was replaced. I would also note for the record, candidly, despite the potential injury involved, that the tile incident did serve as a catalyst for the County Board releasing some monies for fixing the ceiling in the courtroom. Well served.

On behalf of the Journal, gentlemen.

MR. DAWSON: John Dawson, Michael Fischer.

THE COURT: Thank you, Mr. Dawson. I appreciate your appearance, as well.

This is a matter before the Court this morning for purposes of a decision regarding a motion for summary judgment brought on by the Defendant, Journal Company, to dismiss all claims for want of a material issue and fact.

Matter was argued in August. As a result of that appearance, the Court did solicit additional input concerning the – an understanding of the concept of a monopoly leverage. The Court did receive contemporaneous submissions from the parties and they were reciprocally delivered.

A matter that came as a result of that was as a part of the submission, by the Conley Publishing, there was an affidavit that was attached thereto and it's from a Mr. Ciccantelli and then there was a letter in response to that submission by the Journal objecting to the submission inasmuch as the cut off for submissions in support of the position of the Conley Publishing was due by June the 8th.

There was no effort to seek an enlargement of that time from the Court nor was one somehow granted for any reason and there were other objections to the content of the document inasmuch as portions of it may well not be admissible at trial.

So it's not in proper affidavit format and if I might surmise, simply unfair at this point to have submitted that particularly where the Court solicited no such input. Fairly stated, Mr. Dawson?

MR. DAWSON: Yes, Your Honor.

THE COURT: Any comment you want to make regarding that, Mr. Parsons?

MR. PARSONS: No comment.

THE COURT: For the reasons I've stated, firstly, that the affidavit was untimely all such documents in support of the Plaintiff's position were due by June the 8th. that no exception to that order was sought from the Court. You gentlemen worked your own schedule to a large degree and to be commended for that concerning the discovery in this matter in preparation for the motion.

Thirdly, that it was filed without permission. It was -- Large portions of the document itself, the Court having reviewed it, contain what I would determine inadmissible hearsay and statements made without sufficient foundation in light of the circumstances as they're described by the affiant regarding his own knowledge.

Finally, that it's unfair, discusses issues that were not solicited by the Court and there is no opportunity for the Journal to respond to it.

For all those reasons, I'll disregard it in terms of the Court's decision here today.

Other than that issue, and obviously the Court's decision respecting the interest of the parties, is there anything else we need to address immediately or for any other purpose, Mr. Dawson?

MR. DAWSON: Not from the defense side, Your Honor.

THE COURT: Thank you. Mr. Parsons?

MR. PARSONS: No, sir.

THE COURT: All right. Thanks very much. Then, gentlemen, and thank you for all your cooperation with the Court in an effort to enlighten the Court concerning the matters that are brought to bear here today.

This is, as I described, a motion for summary judgment. It is the position of the – or excuse me, the position of the or the state of the law that claims should be dismissed as a matter of law if there are no genuine disputes of material facts which could support a theory of recovery by the Plaintiff.

Any factual issues that survive such a motion must be of such a nature that a reasonable juror could return a verdict for the non-moving party.

In other words, there must be a material issue of fact before this Court is in a position to permit the matter to proceed to trial.

The Plaintiff has advanced five causes of action. The first of which claims that the actions of the Journal respecting certain discounts solicited to the, its Sunday customers, were secret discounts within the meaning of the statute.

Let me offer these thoughts concerning the facts in this case as they bear on that particular issue.

First, there is no dispute that the Milwaukee Journal during a period of time relevant to these proceedings perhaps as early as 1988, engaged in a Sunday daily conversion plan. This plan was offered only to Sunday subscribers and the gist of the plan was this. There being a Sunday subscriber, a solicitation was made by way of the telephone to convert that plan to a shortened number of Sundays for the subscription in exchange for which the Journal would thereafter provide daily as well as Sunday service.

In other words, programs for such as a period of subscription for 13 weeks would be shortened to nine weeks in exchange for which the recipient of the subscription would receive the daily paper for that entire period of time to include the Sunday only delivery.

The average period of these programs shortened the overall subscription three or four weeks. There was no additional charge

made for these conversions. In other words, if the subscriber had paid "X" amount of dollars for the Sunday subscription in exchange for a shortened period of Sunday subscription he or she would receive the daily paper and as well not be required to pay any additional cost.

These subscriptions or these offers by the Milwaukee Journal attenuated the entire eleven county Southeast Wisconsin area and that at times material to this complaint, phone calls were made somewhere between the numbers of 50,000 to 68,000 annually in solicitation of this program.

That is 50 to 68,000 subscribers were contacted and asked whether or not they wished to convert to the program.

It is uncontested that throughout this period of time the Milwaukee Journal by way of this conversion program was offering service at a 50 percent or greater published rate. That is the cost of those papers going out was in my opinion of the Milwaukee Journal at something more than 50 or more percent of the publish rates and that is undisputed.

The Freeman, that is, the Conley Publishing Company in its present state, but the Waukesha Freeman through its prior ownership, became aware of the program perhaps as early as 1992.

Certainly information was sent acknowledging the program to the Freeman as early as 1996 and the – this 50 percent cost below daily subscription rate is not a unique program.

In fact, as to that rate of cost, the Freeman itself has similar programs as do innumerable daily papers throughout the United States. In order, under Section 133.05 for such a program, that is the discounted subscription rate to pass muster, it must be one, a secret and secondly, an unearned discount.

The leading case in Wisconsin obviously is Jauquet Lumber v. Kolbe & Kolbe Millwork, 164 Wis.2d 689, which is -- The Court's attention is directed by both sides to that matter. That is at page 689 if I overlooked that, in which the Court of Appeals, I believe the Fourth District of this State, determined that secret is given its common meaning within the statute because it's not described otherwise.

That is something that is kept from the knowledge or view, concealed or hidden. In the facts as they are argued here, there is no case to support the contention in my estimation, that a solicitation of between 50 to 68,000 people annually is a secret.

It is hard to imagine in a common sense environment that such a subscription opportunity is in fact a secret where any number of households are contacted on an annual basis.

It's also not a secret in my estimation because the Freeman became aware as early as 1992, perhaps 1996, at the latest, by uncontroverted evidence that in fact such a program was on going.

Furthermore, it is interesting to note that apparently any number of persons employed by the Waukesha Freeman were in fact solicited for such a program assumedly because they were Sunday subscribers to the Sunday Journal.

Jauquet talks about these types of matters being secret within the meaning of Chapter 133 where there is no effort to affirmatively publicize and while under some – some circumstances may be an affirmation as to the existence of such a program.

This Court concludes that the facts in this case do not support arguably any absence of publication or wide dissemination speaks for itself. There are no facts to support any misrepresentation as to the existence of such a program by the Journal, and, therefore, this Court concludes as a matter of law that this program was not a secret.

The Plaintiff in such matters is also required to prove in addition to being secret, that the discount was unearned. What is overlooked in such argument is there is no free opportunity here for any subscriber. That, in fact, in exchange for a shortened program of subscription, additional newspapers are provided. There is no argument that in fact such actions were done to anything other than the 50 percent publish rate that I alluded to earlier and in fact as I indicated, that the Freeman actually sells its newspapers at a similar rate.

So in such circumstances, the Court cannot conclude as a matter of law that the discount itself was unearned as well. Therefore, the undisputed material facts as to Count 1 favor the Defendant overwhelmingly and the Court will grant summary judgment dismissing Count 1.

Counts 2 and 3 deal with the stand-alone cause of action of monopoly leverage.

The argument by Conley is that no monopoly leveraging is a stand-alone cause of action as a result of cases stemming from the Second District Court of Appeals in the Federal system.

In order to succeed on a claim for monopoly leveraging, a party must first possess monopoly power in one market.

Secondly, use that power to gain a competitive advantage in another market and three, cause injury by such anticompetitive conduct.

Under the theory of Berkey v. Kodak, there is support for the argument that there need be no showing of any attempt to monopolize or an actual monopoly to occur in order to prevail and, therefore, no monopoly leveraging is in an esoteric sense considered to be an available cause of action.

Since Berkey, however, I'm not aware of any cases that support the contention and that in fact the overwhelming case law as additionally supported in Spectrum Sports recognizes in essence monopoly leveraging is a means by which attempt to monopolize or monopolization might occur, but that is in Spectrum Sports the Supreme Court spoke, it makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so.

In other words, under the Berkey theory, monopoly leveraging can occur with no intent to monopolize in the second market as described under the case law and I believe that particular approach to the cause of action has been overwhelmingly rejected, firstly, by the majority of Courts of Appeals as well as the Supreme Court in Spectrum.

In fact, as recently as the Virgin decision this past summer at Virgin Atlantic v. British Airways, this case decided in July of this year, 257 Fed.3rd, 256, the author of that decision out of the Second District, recognizing the Berkey case, also concludes further that as under an ordinary diagnostic system there must additionally be a showing not only of the attempt to monopolize or dangerously threaten to do so but that the claim for monopoly leveraging requires a showing of both propriety of or anticompetitive conduct.

I'm satisfied that monopoly leveraging by way of a means to an end may be demonstrated but as a stand-alone cause of action does not exist either in Wisconsin or under the present state of the Federal case law and for those reasons alone, I'll dismiss Counts 2 and 3 as failing to state a cause of action upon which relief can be granted.

Now, that takes us to Counts 4 and 5 of the complaint which by way of their writing ascribed to all other provisions of the complaint and understandably so Count 4 is a contract alleging the contract in the string of trade.

In Count 5 it alleges attempt to monopolize or in fact to monopolize.

Under either this Court need, in my opinion, address the elements of either predatory pricing or anticompetitive contract behavior by the Journal which requires that the Plaintiff prove that prices complained of are at or below an appropriate measure of its rival's costs actually are below the rival's cost and secondly, that a dangerous probability of the Journal in this case the Journal or any Defendant of recouping its investment can be low cost pricing.

Now, what has been demonstrated by way of the record at this point in time concerning the issue of predatory pricing.

The position of the experts by the Journal is understandable. What is key is the positions adopted by the experts provided by the defense presently or not the defense but in the case of Conley, the non-moving party principally Professor Gollop's deposition.

Professor Gollop's opinion concludes that on an individual cost basis that the Journal is arguably selling the newspaper for something less than it costs to produce it. What Professor Gollop's opinion does not include is an opinion as to whether or not or excuse me, that it fails to address the material issue of whether or not the total advertising revenue as folded into the contracts – strike that. As folded

into the price of the paper is below the cost to either the Journal or its competitor.

At this point this Court concludes that the opinion of Dr. Gollop is simply that the cost is no more than what's described as something less than the market price. There is no testimony by Dr. Gollop that this particular newspaper as sold by the Journal under this particular arrangement is anything less than the rival cost of the Waukesha Freeman.

Secondly, Dr. Gollop should be required to offer the record some probability as to what the costs of the Journal are respecting its investment in this below cost pricing.

The record is silent respecting any such testimony. There is no showing by Dr. Gollop or any other witness in this record at this point that the Journal will at some future date be charging higher prices for its paper, and secondly, what the necessary amount it needs to recoup from its loss is or even that the Journal has or will suffer a loss as a result of the Sunday subscriber program.

Therefore, this Court concludes that there are no facts to support a predatory pricing circumstance that is alleged.

Respecting the advertising matters there is a program of advertising which is alleged to be in violation of the antitrust laws that concerns first dollar discounts. And it is the argument of the Conley Publishing that such dollar discounts were extrusionary as much as this prohibited large volume advertisers from advertising with the Waukesha Freeman.

The substance of these programs is as follows: That one buys "X" lines of advertising for a fixed amount of money. If one exceeds a certain number of lines of advertising during the course of the contract, then the next line and all lines preceding that line of advertising are at a reduced rate.

It is the argument of Dr. Gollop that in fact this particular pricing scheme does two things.

Firstly, it provides for free advertising for those lines that make up the difference after you cross the threshold and secondly, that it requires advertisers to continue to place their money with the Journal, and, therefore, precludes them from advertising in the Freeman.

What has not been offered on this record concerning this particular issue, is any testimony from any advertisers that they were

so induced. Presumably, if there was such information, it would have been made available.

Again, no one has come forward at this stage in the proceeding and said in effect that I was required to continue to advertise with the Milwaukee Journal because of the price methodology by which I contracted.

In addition, there is no credible testimony on this record that would be admissible at trial to suggest that the contracts themselves are somehow violative of the antitrust laws.

There is no showing anywhere that such contracts are being done at below cost and in fact that the proper, at least a proper mechanism by which to evaluate these contracts, is the overall cost of the lines provided as compared to the cost of the contract itself.

But we -- Dr. Gollop seems to ignore that approach nor does he approach the matter from the overall revenues that perhaps could be folded in to consider this form of advertising as another methodology.

He simply illustrates on that particular instance of particular free lines that we discussed and offers no support for that argument.

There is no support offered by that argument by Conley to suggest that any one or more of large volume advertising in fact has been discouraged from advertising with the Freeman as a result of that.

Furthermore, Dr. Gollop concludes in his deposition that these large volume advertisers would not – it would not make sense for them to advertise in the Milwaukee or excuse me, in the Waukesha Freeman because of the numbers of dollars involved, the numbers of individuals that are sought to be contacted, that the Freeman really is not a competitor for such advertising dollars.

It's hard to imagine how a claim for such anticompetitive conduct where the Freeman is not in a position to compete could survive.

Finally, there is the matter of the proof of damages as concerns all five causes of action in this matter.

There are, in Dr. Gollop's deposition, no statements whatsoever -- Well, let me back up for just a moment in that regard.

We're talking about the desegregation of damages here and what needs be shown by Conley to survive a motion for summary judgment.

It is the argument of Conley that in fact because their damage expert has indicated a significant loss of revenue as a result of lost subscriptions and lost advertising dollars that in fact this is as a result of the Milwaukee Journal's anticompetitive conduct.

In MCI v. ATT, which is a case cited I believe by the Journal in one of its briefs, I'll read in pertinent parts from the decision of the causation of damage question in that case.

"Plaintiffs must prove antitrust injury which is to say injury of a type that antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Once causation of damages has been established, the amount of damages may be determined by just and reasonable estimation as long as the jury verdict is not the product of speculation or guesswork.

Since the Supreme Court has been willing to accept," and this talks about the United States Supreme Court, "to accept a degree of uncertainty in the calculation of damages, strict proof of damages having been caused by which acts is not required."

This Court's reading of that is there are illegal acts taking place under the antitrust laws that – that the complaining party

need not come forward and individualize as to which acts caused which specific damages.

However, it is essential, however, that the damages reflect only the losses directly attributable to unlawful competition. It continues, "When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principal estimate of the amount of damage.

This is precisely the type of speculation or guesswork not permitted for antitrust jury verdicts. There is nothing inconsistent between requiring proof that damages were caused by illegal acts and the rule that a plaintiff need not desegregate damages among those acts found to be unlawful," and I think that bears with what I said earlier.

That where the complaining party or the plaintiff in this action is not required to in essence ferret out and attribute the amount of damages to each particular act, the plaintiff still must be in a position to prove that the damages are attributable to the antitrust behavior and not simply as Mr. Degen has presented a loss in revenue to the Waukesha Freeman over a period of time where his assumption in his documents are that these damages are attributable to the acts of the Journal.

One other comment I would offer in that regard. Conley cited the case of Merco Distributing Corporation v. Commercial Police Alarm as to stand for the proposition that the defendant's unlawful conduct was a substantial factor in the plaintiffs, that is, the claimant's loss.

In other words, there must be some substantial fact or relationship that exists between the complained of conduct and the losses sustained by the plaintiff. The direct quote at Page 460 from that decision by Justice Abrahamson, is, "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the Court to direct a verdict for the defendant."

Dr. Gollop's testimony is replete with an analysis of the predatory pricing circumstances that he describes. It is replete with an analysis of the anticompetitive advertising contracts as he purports them to be.

This Court has found earlier in its decision that such conduct was not improper or unlawful but even given such, if they were this Court is wholly without a factual basis by way of this record as to the causation issue.

Dr. Gollop or anyone else has offered no opinion whatsoever that in fact the activities of the Milwaukee Journal are directly related substantial facts or material facts in the damages sustained purportedly by the Conley Publishing, particularly the Waukesha Freeman.

On that basis alone, Counts 4 and 5 are dismissed. Furthermore, however, it is the opinion of this Court that in useable form admissible at trial there has been no evidence offered to disaggregate the damages.

The report of Mr. Degen assumes a causation that does not exist at least not demonstratively having existed. No arguable facts in this court now to support the idea that there is a causation linkage between the activity of the Journal but even beyond that there is no effort to disaggregate the damages as they've been demonstrated respecting what Mr. Degen really is an analysis of lost revenues as a result of the lost subscribers.

Every analysis provided by Mr. Degen based upon the lost subscription rate in no way, shape, fashion or form has anyone come forward on behalf of Conley to describe the market conditions, the management styles, the programs that were offered other than to

acknowledge that perhaps some business decisions made by the Freeman over time have contributed to the loss of subscriptions and, therefore, this Court concludes that there has been no showing of disaggregate damages sufficient to raise a question before a jury as to factual dispute and, therefore, for all those reasons grants the motion in its entirety and dismisses the action with prejudice.

Mr. Dawson, I look for an order to this effect under the five-day rule. Is there anything else, gentlemen, we need to attend to this morning? First, on behalf of the Journal?

MR. DAWSON: No, Your Honor, thank you very much.

THE COURT: Mr. Parsons?

MR. PARSONS: Nothing further.

THE COURT: All right, gentlemen, thanks very much for your cooperation. Good luck to the parties.

(Proceedings concluded at 11:30 in the forenoon.)

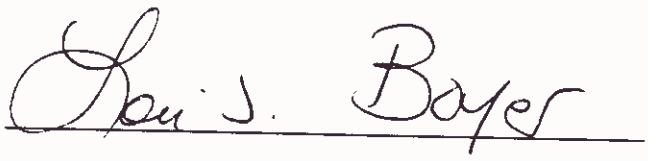
STATE OF WISCONSIN)

)

WAUKESHA COUNTY)

I, Lori J. Boyer, Official Reporter, do hereby certify that I reported the foregoing matter and that the transcript, consisting of 23 pages, has been carefully compared by me with my stenographic notes as taken by me in machine shorthand and by me thereafter transcribed and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge.

Dated this 9th day of October, 2001.



Lori J. Boyer, Official Reporter

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

BRANCH 1

CONLEY PUBLISHING GROUP LTD.
FREEMAN NEWSPAPERS LLC,
and LAKESHORE NEWSPAPERS, INC.

Plaintiffs,

v.

JOURNAL COMMUNICATIONS, INC.,
JOURNAL SENTINEL, INC.

Defendants.

Case No: 00-CV-222
Case Code: 30703
Unclassified
Hon. Joseph E. Wimmer

Report of Frank M. Gollop, Ph.D.

My name is Frank M. Gollop. I am Professor of Economics and Director of Graduate Studies in the Economics Department at Boston College, located in Chestnut Hill, Massachusetts. A copy of my curriculum vitae is included as Appendix A.

This report provides an economic analysis of recent actions taken by defendants Journal Communications, Inc. and *Journal Sentinel* Inc., hereinafter collectively referred to as the "Journal." Based on information gathered to date, it is my opinion that the defendants' actions directed at both newspaper subscribers and advertisers in the relevant markets are anticompetitive. In particular, the Journal is leveraging its monopoly power in (i) circulation of and advertising in paid Sunday newspapers in the Milwaukee metropolitan area and (ii) daily paid newspaper circulation and advertising in the city of Milwaukee in an attempt to monopolize both paid newspaper circulation and advertising in at least neighboring Waukesha County.

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I. RELEVANT MARKETS

Economic theory posits that two products or firms are in the same "relevant product market" if they constrain each other's ability to exercise market power by raising prices and/or lowering quality. The operative constraint is the fear that, in response to higher prices or lower quality, consumers will migrate to a competitor's product.

There are both product and geographic dimensions to defining relevant economic markets for antitrust analysis. The following subsections address these for the two products of interest in this case: newspaper subscriptions and advertising. While newspaper circulation and advertising sales are highly correlated, they are two distinct non-substitutable products.

Subscriptions. The relevant product markets for subscriptions in this case have two distinct dimensions: (i) subscriptions to daily versus Sunday newspapers and (ii) traditional paid-subscription newspapers versus "shoppers," radio, TV, and Internet services. First, it is my opinion that Sunday and daily newspapers compete in separate markets. The day-specific news content distinguishing the dailies from Sunday papers and the in-depth feature articles, magazine inserts, and weekly TV logs only found in Sunday papers are sufficient to make daily and Sunday papers distinct, non-interchangeable products. This distinction appears to be widely accepted in the newspaper industry. Second, it is my opinion that relevant economic markets should be defined on paid-subscription daily and Sunday newspapers. Neither free "shoppers" nor weekly papers are economic competitors to regular daily and Sunday newspapers since they do not have time-sensitive news content. Furthermore, it is my opinion that daily and Sunday newspapers do not meet radio, television or Internet providers as economic competitors in the markets relevant for

this case. Unique content and delivery characteristics of newspapers place them in separate economic markets from electronic media.

The geographic dimension of daily newspaper markets in the Milwaukee metropolitan area is, in my opinion, truly local in scope. The unique content characteristics of local newspapers place them in economic markets distinct from national or regional print media. Moreover, relevant newspaper markets in the Milwaukee area appear to be defined by county boundaries. Newspaper subscribers in the urban city and county of Milwaukee, for example, would not consider the *Waukesha Freeman* to be a competing product. Residents of Waukesha County, however, do consider the *Freeman* and the *Journal Sentinel* (in particular the *Journal Sentinel* edition zoned for Waukesha) to be competing products. In short, the practical realities of newspaper offerings in the Milwaukee area define the county-specific nature of geographic market boundaries. The *Journal Sentinel* , for example, delivers to its subscribers one of three distinct county-specific zoned editions depending on the subscriber's delivery address. (The three editions are defined on Milwaukee, Waukesha, and combined Washington-Ozaukee counties.) Similarly, the *Waukesha Freeman* is available to subscribers only in Waukesha County. Economic substitution by subscribers across county lines therefore is nonexistent. Milwaukee, Waukesha, and combined Washington-Ozaukee counties, in my opinion, represent three separate relevant economic markets for daily paid newspaper subscriptions.

The same argument formally applies to the definition of relevant antitrust markets for Sunday newspaper subscriptions. Milwaukee, Waukesha, and Washington/Ozaukee counties are each a separate relevant economic market for Sunday subscriptions. Specially zoned editions of the *Journal Sentinel* are delivered within each county. Each edition focuses on county-specific news and events. They are distinct products produced by the same publisher and are likely viewed as noncompeting products by both the Journal and its subscribers. For purposes of this report, however, I consider the wider four-county area to be the relevant market for the analysis of Sunday subscriptions. Since the *Journal*

Sentinel is the only Sunday newspaper in the four-county area, establishing markets narrower than the four-county region provides no additional antitrust insight.

Advertising. The economic analysis of advertising differs in some important respects. The primary and therefore most effective competitors for advertising in both daily and Sunday papers includes only rival paid subscription dailies and Sunday papers, respectively. There are other media through which sellers advertise their products but they have limited competitive effect in the market for advertising in newspapers. Free mailers and weekly shoppers are unsolicited mailings that advertisers recognize may simply be thrown away unread. Moreover, they do not convey an elite product message so valued by advertisers. Paid-subscription weeklies cannot deliver time-sensitive information. Advertisements on radio and television cannot present detailed price or stock information as can, for example, automobile or supermarket ads in newspapers, nor can they provide, among other things, store coupons, classified ads, or legal notices. Advertising messages delivered via radio or television generate brand recognition and therefore are complementary with but not substitutes for newspaper advertising. Advertisements in free mailers and weekly papers or on radio and television are not reasonably interchangeable for the same purposes as are ads in daily and Sunday newspapers.

The relevant geographic scope of advertising markets is narrower than might be gleaned at first blush. It is true that advertisers, whether their address is in Waukesha, Milwaukee, or New York understandably desire to reach potential customers throughout the larger Milwaukee metropolitan area but that does imply that advertising in, for example, Waukesha and Milwaukee counties are substitute goods. Newspaper advertising in Waukesha and Milwaukee gain access to different potential consumer groups, different not only in the usual demographics of education and income but, at a minimum, by geographic location. Advertising in Waukesha does not access potential consumers in Milwaukee.

Advertising in the Milwaukee edition of the *Journal Sentinel* does not reach Waukesha residents.

Therefore, advertising targeting Milwaukee households is a distinct, non-competing product with advertising destined for Waukesha residents. The geographic boundaries of newspaper advertising markets are therefore defined by the practical boundaries of the newspapers in which they appear. The Journal therefore is a monopolistic seller of newspaper advertising in its daily Milwaukee and its Sunday newspaper markets. However, it and the *Waukesha Freeman* are economic competitors for newspaper advertising in Waukesha County.

II. BARRIERS TO ENTRY

Significant barriers to entry confront any enterprise attempting to enter a paid-subscription daily or Sunday newspaper market. Significant scale economies exist both in the production and distribution of newspapers. Production is also characterized by high fixed costs. In addition, entry requires substantial capital requirements and the ability to withstand losses for significant periods of time as the entrant attempts to penetrate embedded subscriber and advertiser loyalty to the incumbent paper(s). Quite independent of the above list, an additional barrier arises because much of the expected entry costs are truly sunk—that is, they are irreversible and cannot be recovered through future action or sale. It is my opinion that entry barriers into both daily and Sunday newspaper markets are substantial.

III. ANTICOMPETITIVE BEHAVIOR IN NEWSPAPER SUBSCRIPTION MARKET

The *Milwaukee Journal Sentinel* is the only paid-subscription Sunday newspaper offered in the relevant market for paid subscribers. With high barriers to entry in the newspaper industry, the Journal has monopoly power over paid Sunday circulation. I have seen no evidence to indicate that the Journal has attained this monopoly position through any anticompetitive means. However, evidence indicates that the Journal is presently attempting to extend its monopoly from its four-county wide Sunday market to the daily newspaper market in at least Waukesha County.

Documents produced to date in this case indicate that the Journal has had a business plan in place since approximately 1996 to target new subscribers in Waukesha County in general and existing *Waukesha Freeman* readers in particular. It is my understanding that Journal sales representatives have contacted subscribers to the Sunday *Journal Sentinel* in Waukesha County offering them subscriptions to the daily *Journal Sentinel* at no additional out-of-pocket expense for the remainder of their Sunday contract less four weeks. Subscribers accepting the offer receive the daily *Journal Sentinel* for a term that may approach 20 weeks or more in length.

The Journal's conversion program is extraordinary and antithetical to sound pro-competitive economic principles. First, contacted subscribers to the Sunday *Journal Sentinel* are already under binding full-price contracts. There is no need for the Journal to offer them any discount on the contracted Sunday rate which, under the Journal's "2000 Marketing Plan," equals $1.60 per week. Second, contacted subscribers accepting the offer of the "Conversion Package" receive a $31.60 value (based on $1.58 weekly "moderate promotional rate" for 20 weeks of the daily *Journal Sentinel* under 26-week plan) in exchange for giving up four issues of the Sunday *Journal Sentinel*, a $6.40 value

(based on $1.60 full-price weekly rate for the Sunday *Journal Sentinel* under 26-week plan). In short, these subscribers, after having agreed to a binding contract, are allowed to convert that contract to one that includes the Sunday paper and a free daily paper for 20 weeks. Each subscriber is converted to a contract that has a market value $25.20 ($31.60 - $6.40) above the value of the subscriber's already binding contract, and all this without soliciting the Journal for reduced rates or additional service.

While newspapers often engage in promotional discounts, the unsolicited offer of a free (even negatively-priced) daily subscription for such a long duration to already contract-bound subscribers appears to be both excessive for promotional needs and exceptional relative to promotions offered by major newspapers in other U.S. cities. It is even excessive relative to the daily promotion the Journal offers to those who do not subscribe to the Sunday *Journal Sentinel*. The standard offer to these households currently involves an approximate 30% discount from the standard full seven-day subscription price. Subscribers accepting the "Conversion Package" enjoy a 50% discount on both Sunday and daily subscriptions. Curiously, while a newspaper promotion typically is a mechanism by which potential subscribers can test a paper, the Journal has for nearly four years followed a business plan designed so that incumbent Sunday subscribers receive a far more attractive inducement than do those who arguably are less familiar with the *Journal Sentinel*. Less restrictive alternatives for legitimate promotional objectives appear to be available both in terms of duration and discounts.

I have concluded that the terms of the Journal's "Sunday Daily Conversion Program" is more consistent with an attempt to monopolize the daily newspaper market in Waukesha County than it is with pure promotional efforts. Furthermore, it is my opinion that the Journal's actions constitute predatory pricing. Two necessary conditions defining predatory pricing seem to be satisfied: (i) the Journal's avoided cost of producing and delivering four fewer Sunday issues to "converted" subscribers is below the Journal's incremental costs incurred to produce and deliver the daily paper to these addresses and (ii)

there are high barriers to entry into the daily newspaper market. Furthermore, the Journal's 1999 Marketing Plan reveals the Journal's clear intent to transform its conversion plan to a "100 percent free" basis once its "Saturday/Sunday delivery package becomes available."

The Journal, of course, can subsidize this predatory strategy (i.e., cover the net increase in its publication and delivery costs) with revenues collected from subscribers to its monopolistic four-county Sunday and Milwaukee daily markets. The Journal's daily newspaper competitors outside of Waukesha County have no such deep pocket available for cross subsidizing daily subscriptions. The Journal's actions are anticompetitive and not without less restrictive alternatives. In my opinion, subscriptions in Waukesha County to the daily *Journal Sentinel* under the Journal's "Sunday Daily Conversion Program" are contracts in restraint of trade.

V. INTERDEPENDENT EFFECTS

Newspaper subscribers and advertisers are two different but interdependent customer groups. Advertisers become more willing to pay higher advertising rates to a newspaper as the paper's circulation increases. Simultaneously, readers are increasingly attracted to a newspaper that carries, among other things, more local advertising. Readership and advertising revenues generally move in the same direction. If either subscriptions or advertising coverage begin to decline for a newspaper, a "downward spiral" may begin.

The Journal's business policies have a dangerous probability of initiating this "downward spiral" for presently competing paid-subscription newspapers. The Journal's Sunday to seven-day conversion subscription offer and its deep-discount advertising

strategy could individually trigger this downward spiral. Offered in tandem, the probability only increases that readers and advertisers will observe increasingly weakened competitors in the daily newspaper market in the counties surrounding Milwaukee proper. The Journal's anticompetitive strategies, in my opinion, indicate an attempt to extend its current monopoly power in (i) Sunday subscriptions throughout the four-county Milwaukee metropolitan area, (ii) daily subscriptions in Milwaukee, (iii) newspaper advertising in the Sunday *Journal Sentinel*, and (iv) advertising in its daily paper in Milwaukee to the daily newspaper market in at least Waukesha County.

VI. DOCUMENTS REVIEWED

I have reviewed a number of documents in advance of preparing this report. They include:

(1) Second Amended Complaint, Conley Publishing, et al v. Journal Communications, Inc., et al;

(2) Answer to Second Amended Complaint; Conley Publishing, et al v. Journal Communications, Inc., et al;

(3) Defendants' Responses to Plaintiffs' Second Set of Interrogatories;

(4) Depositions (Richard Dobson, Helen Hoffman, Jeffrey Hovind, Jonathan Jossart, Robert Allen Schwartz, and Wayne Toske);

(5) Journal Communications, Inc., Marketing Plans (1996 through 2000);

(6) *Milwaukee Journal Sentinel* Retail Advertising Rates (1995 through 2000);

(7) Journal Communications, Inc., Performance Report, 1999;

(8) Journal Communications, Inc., 1999 Financial Statements;

(9) Journal Communications, Inc., 10-K filed with SEC for year ended December 31, 1999;

(10) Practicing Law Institute, Antitrust and the Media, November, 1999;

(11) Community Publishers, Inc., et al v. Donrey Corp, et al, U.S. District Court, W.D. Arkansas, June 31, 1995;

(12) United States of America v. Nat, L.C., and, D.R. Partners d/b/a/ Donrey Media Group, Complaint filed March 28, 1995;

(13) United States of America v. Nat, L.C., and, D.R. Partners d/b/a/ Donrey Media Group, Brief of the United States filed April 26, 1995;

(14) Robert Picard, "Modeling the Problem: De Novo Entry into Daily Newspaper Markets," Newspaper Research Journal, July 1, 1997;

(15) Willard K. Tom, David A. Balto, Neil W. Averitt, "Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing, Antitrust Law Journal, 2000;

(16) Kenneth C. Baseman, "Partial Consolidation: The Detroit Newspaper Joint Operating Agreement (1988)";

(17) U.S. Census Bureau data on population and business sales in Wisconsin and Milwaukee;

(18) U.S. National Telecommunications and Information Administration data on Computer and Internet penetration in Wisconsin and Milwaukee;

(19) Copies of *Milwaukee Journal Sentinel* advertising rate charts, advertising contracts, and ads for advertising in the *Journal Sentinel* (provided by counsel); and

(20) Copies of Journal Communications, Inc. correspondence, memos, reports, Waukesha Project summaries (provided by counsel).

VII. CONCLUDING REMARK

The conclusions presented in this report and the bases offered for these conclusions may change as additional data and information become available before trial. I therefore reserve the right to amend this report.

Dated this 5th day of December, 2000.

Frank M. Gollop

APPENDIX A

FRANK M. GOLLOP

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Professor of Economics, Boston College, 1985-Present

Director of Graduate Studies, Economics Department, Boston College, 1999-Present

Associate Professor of Economics, Boston College, 1979-1985.

Assistant Professor of Economics, University of Wisconsin-Madison, 1974-1979.

GRADUATE STUDIES:

Harvard University: A.M., November 1972; Ph.D., July 1974

Ph.D. Thesis: Modeling Technical Change and Market Imperfections: An Econometric Analysis of U.S. Manufacturing, 1947-1971.

UNDERGRADUATE STUDIES:

University of Santa Clara: A.B. in Economics, June 1969
A.B. in Philosophy, June 1970

SPECIAL APPOINTMENTS:

Economic Classification Policy Committee, Expert Consultant to U.S. Government, 1992-1998.

TEACHING AWARD:

1999-2000 Distinguished Teaching Award, Boston College

RESEARCH GRANTS:

U.S. Department of Agriculture Grant 1995-99
National Science Foundation Grant, 1992-94
U.S. Department of Agriculture Grant 1992-97
U.S. Bureau of the Census Grant, 1985-87
U.S. Bureau of the Census Grant, 1984-86
Federal Trade Commission Grant, 1984
Research Fellowship, Boston College, 1984

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U.S. Bureau of the Census Grant, 1983
U.S. Bureau of the Census Grant, 1982
U.S. Department of Commerce Grant, 1982
Center for Economic Development Grant, 1982
Federal Energy Regulatory Commission Grant, 1980
U.S. Department of Labor Grant, 1979-1980
U.S. Department of Commerce Grant, 1978-1979
Graduate School Research Committee Grant, Univ. of Wisconsin, 1979
National Science Foundation Grant, 1977-1978
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Graduate School Research Committee Grant, Univ. of Wisconsin, 1977
Department Fellow, Harvard University, 1971-1972
University Fellowship, University of Santa Clara, 1965-1969

PROFESSIONAL SOCIETIES:

American Economic Association
Conference on Research in Income and Wealth
Eastern Economic Association
Western Economic Association

RECENT REFEREEING ACTIVITY:

American Economic Review, National Science Foundation, Review of Economics and Statistics, Land Economics, Southern Economic Journal, The Canadian Journal of Economics, Journal of Environmental Economics and Management, Review of Industrial Organization, American Journal of Agricultural Economics.

PUBLICATIONS:

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1980 Law and Society Association: "A Microeconomic Model of Household Choice: The Household as a Disputant."

1981 Conference on Current Issues in Productivity, Rutgers University: "Growth Accounting in an Open Economy."

1981 Western Economic Association: "An Open Economy Model of Productivity Growth."

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1983 Southern Economic Association: "Cost-Minimizing Regulation of Sulfur Emissions: Regional Gains in Electric Power."

1984 Federal Trade Commission Conference: "The Effect of Warranty on Used Car Prices."

1984 U.S. Bureau of the Census Conference: "From Homogeneity to Heterogeneity: An Index of Diversification."

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1998 American Agricultural Economics Association: "Incorporating Changing Water Quality into Measures of Farm Sector Productivity Growth" (January 1998).

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INVITED PRESENTATIONS:

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1976 National Association of Regulatory Utility Commissions, Staff Subcommittee on Economics: "Efficiency Implications of Fuel Adjustment Mechanisms."

1977 State of Wisconsin, Public Service Commission: "Critique of 'Preliminary Generic Environmental Impact Statement on Electric Utility Tariffs'."

1977 U.S. Bureau of Labor Statistics: "The Measurement of Labor Input."

1978 National Academy of Sciences, National Research Council: "Microeconomic Theory Applied to Productivity Analysis: The Link Between Sectoral and Aggregate Accounts."

1978 Econometric Society: Comments on "The Econometrics of Exhaustible Resources," by Lars P. Hansen

1978 University of Virginia, Department of Economics: "Modeling Factor Market Imperfections."

1979 Boston College, Department of Economics: "Firm Interdependence in Oligopolistic Markets."

1979 State University of New York at Binghamton, Department of Economics: "The Sources of Growth in the U.S. Electric Power Industry."

1979 Federal Trade Commission: "Firm Interdependence in Oligopolistic Markets."

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1999 U.S. Federal Communications Commission: "Assessment of FCC Proposal for Price-Cap Modifications."

2000 U.S. Federal Communications Commission: "Economic Analysis of Inter-Exchange Carrier Proposals for Price-Cap Regulation of Local Exchange Carriers."

Report of Carl G. Degen
Conley Publishing v. Journal Communications

Qualifications

My name is Carl Degen. I am Senior Vice-President of Christensen Associates, an economic research and consulting firm located in Madison, Wisconsin. A copy of my resume is included as Appendix A. Appendix B contains a list of cases in which I have testified within the preceding four years. A list of the documents I have been provided in this case appears as Appendix C. Compensation for my work in this case is $300 per hour.

I have been retained by counsel for Conley Publishing (Conley or the Freeman) to measure damages arising from the anti-competitive business practices of Journal Communications (the Journal). The five causes of action detailed in the Second Amended Complaint relate to two specific business practices. First I understand that the Journal has given unsolicited discounted and free subscriptions of its daily paper to full-price subscribers of its Sunday paper. Conley alleges that the free subscriptions are illegal because they were secret, because they leverage the Journal's monopoly in the Sunday paper, and because they restrained trade. Second, I understand that the Journal offered discounts designed to cause advertisers to spend all of their ad budgets with the Journal. Conley alleges that the Journal's discount structure is illegal because it leverages the Journal's monopoly in the Sunday paper and restrains trade. I will estimate damages from the two business practices at issue separately.

For each cause of action the damages at issue are the actual harm suffered by Conley because of the Journal's action. The harm to Conley is the lost profit on the sales of subscriptions and advertising that Conley would have made, but for the Journal's actions.

Lost Subscriptions

The Journal has offered free and/or heavily discounted weekly subscriptions to its full price Sunday subscribers dating back to 1996.[1] Since 1996 Waukesha Freeman subscriptions have fallen steadily. The reduced circulation also took away from the Freeman's advertising revenue.

While the population has grown in Waukesha County,[2] overall newspaper readership is slightly down since 1995, with the exception of 1997. I sum the Freeman subscriptions and daily Journal subscriptions to Waukesha residents to obtain a total for the entire market, 1995-2000.[3] To calculate what Freeman subscriptions would have been, but for the accused subscription practice of the Journal, I apply the Freeman's share of that market for 1995 to the Waukesha County total for each year 1996-2000. I then calculate lost subscriptions as the Freeman's but-for subscriptions minus their actual subscriptions each year. These calculations are shown in Table 1.

Lost profits from lost subscriptions are valued by multiplying the number of lost subscription by the incremental profit per subscription. The incremental

[1] See documents Bates # D0020396 and D0020390.
[2] United States Census Bureau – www.census.gov
[3] Subscriptions are averages taken from April 1 through March 31 of the following year.

costs of subscriptions are the printing and delivery costs, which, for the Freeman, are approximately 17 cents and 10 cents per issue, respectively.[4] There are 307 delivery days per year. So the marginal cost per subscription is $82.89 ($.27*307). The average annual subscription price is $125 per year[5] leaving a marginal profit of $42.11. These calculations are also shown in Table 1. Lost profits from lost subscriptions total $813,091 through 2000.

As discussed below, the Freeman also lost advertising revenue, which is directly attributable to the lost subscriptions. Advertising revenue is partially determined by subscriptions. My analysis of lost advertising revenues will include calculation of the portion associated with the decline in subscriptions.

Lost Advertising Revenue

My understanding is that only retail advertising (local and national) is directly affected by the accused practice of discounting to obtain all of each customer's advertising expenditures.[6] I calculate lost retail advertising revenues using the method I used for subscribers. I calculate but-for retail advertising revenues, subtract actual retail advertising revenues, and the remainder is lost retail advertising revenues. I calculate but-for retail advertising revenues by applying a calculation of retail advertising revenues per subscriber times the number of subscribers. I start with the Freeman's 1996 retail advertising revenue per subscriber. I grow that amount each year at the same rate as the NAA's U.S.

[4] Wayne Toske, Director of Marketing, Conley Publications, provided these data to me.
[5] Id.
[6] However, all advertisers are likely to prefer higher subscription levels.

daily newspaper retail advertising revenue per subscriber.[7] By growing the Freeman's retail revenue per subscriber at this rate, I am reflecting price increases based on the demand for newspaper advertising. The inflation/market-factor adjusted retail revenue per subscriber is multiplied by the but-for number of subscribers to obtain total but-for retail advertising revenue for each year. These calculations are shown in Table 2.

Lost retail advertising revenues have two components, the loss due to the accused advertising discounts and the loss due to lost subscribers. I parse the total loss by recognizing that the difference between actual and but-for retail advertising revenues per subscriber is due to the accused advertising discounts and the difference between the actual and but-for number of subscribers is due to the accused subscription practices.

I calculate the lost retail advertising revenues due to the accused subscription practices as the number of but-for subscribers each year times the Freeman's actual retail advertising revues per subscriber, less the Freeman's actual retail advertising revenues. See Table 4. I calculate lost retail advertising revenues due to the advertising discounts as the difference between total but-for retail advertising revenues minus but-for subscription revenues. See Table 5. The results are shown graphically in Figure 1.

I calculate the Freeman's lost advertising profits by subtracting the marginal costs of additional advertising. For each additional dollar of advertising revenue, the Waukesha Freeman incurs a printing cost of 32 percent and a 4.5

[7] See the Newspaper Association of America Web site (www.naa.org/info/facts00/08, 10/25/00 and www.naa.org/info/facts00/12, 10/25/00).

percent sales commission leaving marginal revenue of 63.5 percent. An increase of $91,110 of advertising revenue would also cause the need to hire an additional employee at a cost of $25,000. Thereafter, each $302,485 of additional advertising revenue would require an additional worker at $25,000 per employee.[6] My calculations subtract these costs also. Additional staff costs are pro-rated across the subscription and advertising discount calculations. It is also my understanding that the Freeman has incurred some additional marketing expenses to mitigate the damage from the Journal's discounting policies. Therefore, my damages calculation is conservative in that these additional expenses are not reflected. My calculations of lost profits from advertising are shown in Tables 3, 4, and 5.

Summary

As shown in Table 6, my calculation of the Freeman's total lost profits are $2,161,012. As a result of the Journal's accused subscription practices, the Freeman lost $813,091 in subscription profit and $747,254 in lost advertising profit. The Freeman further lost $600,667 in advertising revenue, due to the Journal's accused advertising practices. My calculation of lost profits is only through the present. The current market value of the Freeman has been reduced by the present value of these and future lost profits. My understanding is that another expert will provide a valuation of the Freeman reflecting the future value of lost subscribers and advertisers.

[6] See memo from Wayne Toske titled Incremental Cost of Additional Ads, dated December 1, 2000.

SIGNED ON THIS 11th DAY OF DECEMBER 2000.

Carl G. Degen

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Table 1
Calculation of Lost Profits from Subscriptions
Waukesha County

(1) Year	(2) Freeman Subscriptions	(3) Journal Subscriptions	(4) Total Waukesha Subscriptions	(5) Freeman Market Share	(6) But-for Freeman Subscriptions	(7) Lost Freeman Subscriptions	(8) Profit Per Subscription	(9) Lost Subscription Profit	
1995	22,082	54,554	76,636	28.8%	22,082	0	$42.11		
1996	19,378	56,341	75,719		21,807	2,429	$42.11	$102,285	
1997	17,805	58,878	76,683		22,085	4,280	$42.11	$180,231	
1998	17,342	57,058	74,400		21,427	4,086	$42.11	$172,061	
1999	16,319	57,237	73,556		21,184	4,865	$42.11	$204,865	
2000	16,319	57,237	73,556		21,184	4,865	$42.11	$153,649	(10)
					Totals	20,525		$813,091	

(1) Year corresponds to April of the reported year through March of the following year.
(2) Total Paid and/or Requested Circulation of the Waukesha Freeman.
(3) Total Net Paid Circulation for the Milwaukee Journal Sentinel Waukesha County Edition.
(4) Column (2) + Column (3).
(5) Column (2) / Column (4).
(6) Column (5) for 1995 x Column (4).
(7) Column (6) - Column (2).
(8) Profit per subscription is calculated as the subscription price ($125), less printing and delivery costs ($82.89).
Printing and delivery costs are 17 cents and 10 cents per issue, respectively, per Wayne Toske.
$82.89 = $0.27 * 307 delivery days per year
(9) Column (7) * Column (8).
(10) 1999 data are used because 2000 data are not yet available. The lost profits reflect 3/4 of the fiscal year (through December 2000).

Table 2
Calculation of But-for Advertising Revenue
Waukesha Freeman

(1) Year	(2) Freeman Subscriptions	(3) But-for Freeman Subscriptions	(4) Freeman Advertising Revenue	(5) Advertising Revenue Per Subscription	(6) But-for Advertising Revenue Per Subscription	(7) Freeman But-for Subscriptions Advertising Revenue	(8) Freeman Overall But-for Advertising Revenue	(9) Freeman But-for Adv Discounts Advertising Revenue
1996	19,378	21,807	1,448,888	74.77	74.77	1,630,509	1,630,509	1,448,888
1997	17,805	22,085	1,331,080	74.76	78.79	1,651,075	1,740,077	1,420,082
1998	17,342	21,427	1,254,588	72.35	84.06	1,550,243	1,801,154	1,505,499
1999	16,319	21,184	1,198,112	73.42	86.75	1,555,329	1,837,712	1,480,495
2000(10)	16,319	21,184	722,248	44.26	67.15	937,604	1,422,506	1,207,150

(1) Year corresponds to April of the reported year through March of the following year.
(2) Total Paid and/or Requested Circulation of the Waukesha Freeman.
(3) Column (8) from Table 1.
(4) Total Waukesha Freeman Local and National Advertising Revenue ($).
(5) Column (4) / Column (2).
(6) 1996 Advertising Revenue per Issue (Column (5)) * Newspaper Association of America Advertising Revenue per Issue Growth Rate (per year).
For 2000 we multiply by 3/4 to reflect the partial fiscal year.
Source: www.naa.org/info/facts00/.
(7) Column (3) x Column (5).
(8) Column (3) x Column (6).
(9) Column (8) - (Column (7) - Column (4)).
(10) The 2000 numbers are calculated through the end of the calendar year, which is 3/4 of the fiscal year.

Table 3
Calculation of Total Lost Advertising Profit
Waukesha Freeman

(1) Year	(2) Freeman Overall But-for Advertising Revenue	(3) Freeman Actual Advertising Revenue	(4) Lost Advertising Revenue	(5) Cost of Additional Employees	(6) Lost Advertising Profit
1996	1,630,509	1,448,888	181,621	25,000	$90,329
1997	1,740,077	1,331,080	408,997	25,000	$234,713
1998	1,801,154	1,254,588	546,566	50,000	$297,069
1999	1,837,712	1,198,112	639,600	50,000	$356,146
2000[7]	1,422,506	722,248	700,258	75,000	$369,664
			Total		$1,347,921

(1) Year corresponds to April of the reported year through March of the following year.

(2) Column (8) from Table 2.

(3) Column (4) from Table 2.

(4) Column (2) - Column (3).

(5) Conley would have hired an additional employee ($25,000/employee annually) with additional advertising revenue of $91,110. Thereafter, an additional employee would have been hired for each $393,595 in advertising revenue. Per Wayne Toske memo, and corresponding to $859,200 in annual classified ads and $962,998 in annual retail advertising.

(6) Column (4) x marginal revenue (0.635) - Column (5). Marginal revenue of 0.635 reflects a marginal printing cost of 0.32 and marginal sales commissions of 0.045, per Wayne Toske.

(7) The 2000 numbers are calculated through the end of the calendar year, which is 3/4 of the fiscal year.

Table 4
Calculation of Lost Advertising Profit
Due to Lost Subscriptions

(1) Year	(2) Freeman But-for Subscription Advertising Revenue	(3) Actual Freeman Advertising Revenue	(4) Lost Advertising Revenue But-for Subscriptions	(5) Lost Advertising Profit But-for Subscriptions
1996	1,630,509	1,448,888	181,621	$90,329
1997	1,651,075	1,331,080	319,995	$183,637
1998	1,550,243	1,254,588	295,655	$160,694
1999	1,555,329	1,198,112	357,217	$198,908
2000[6]	937,604	722,248	215,356	$113,686
			Total	$747,254

(1) Year corresponds to April of the reported year through March of the following year.

(2) Column (7) from Table 2.

(3) Column (4) from Table 2.

(4) Column (2) - Column (3).

(5) Column (4) x marginal revenue (0.635) - percentage of the total cost of additional advertising employees ($25,000/employee annually), based on lost revenue share. Marginal revenue of 0.635 reflects a marginal printing cost of 0.32 and marginal sales commissions of 0.045, per Wayne Toske.

(6) The 2000 numbers are calculated through the end of the calendar year, which is 3/4 of the fiscal year.

Table 5
Calculation of Lost Advertising Profit
Due to Accused Advertising Discounts

(1) Year	(2) Freeman Overall But-for Advertising Revenue	(3) Freeman But-for Subscriptions Advertising Revenue	(4) Lost Advertising Revenue But-for Advertising	(5) Lost Advertising Profit But-for Advertising
1996	1,630,509	1,630,509	0	$0
1997	1,740,077	1,651,075	89,002	$51,076
1998	1,801,154	1,550,243	250,911	$136,375
1999	1,837,712	1,555,329	282,383	$157,238
2000[6]	1,422,506	937,604	484,902	$255,978
			Total	$600,667

(1) Year corresponds to April of the reported year through March of the following year.
(2) Column (8) from Table 2.
(3) Column (7) from Table 2.
(4) Column (2) - Column (3).
(5) Column (4) x marginal revenue (0.635) - percentage of the total cost of additional advertising employees ($25,000/employee annually), based on lost revenue share. Marginal revenue of 0.635 reflects a marginal printing cost of 0.32 and marginal sales commissions of 0.045, per Wayne Toske.
(6) The 2000 numbers are calculated through the end of the calendar year, which is 3/4 of the fiscal year.

Table 6
Summary of Total Damages
1996 - 2000

Circumstance	Lost Profit
Lost subscriptions [1]	$813,091
Lost advertising	
Due to lost subscriptions [2]	$747,254
Due to MSJ advertising contracts [3]	$600,667
Total lost advertising [4]	$1,347,921
Total lost profits [5]	$2,161,012

(1) Total from Column (9), Table 1.
(2) Total from Column (5), Table 4.
(3) Total from Column (5), Table 5.
(4) Total from Column (6), Table 3.
(5) Line (1) + Line (4).

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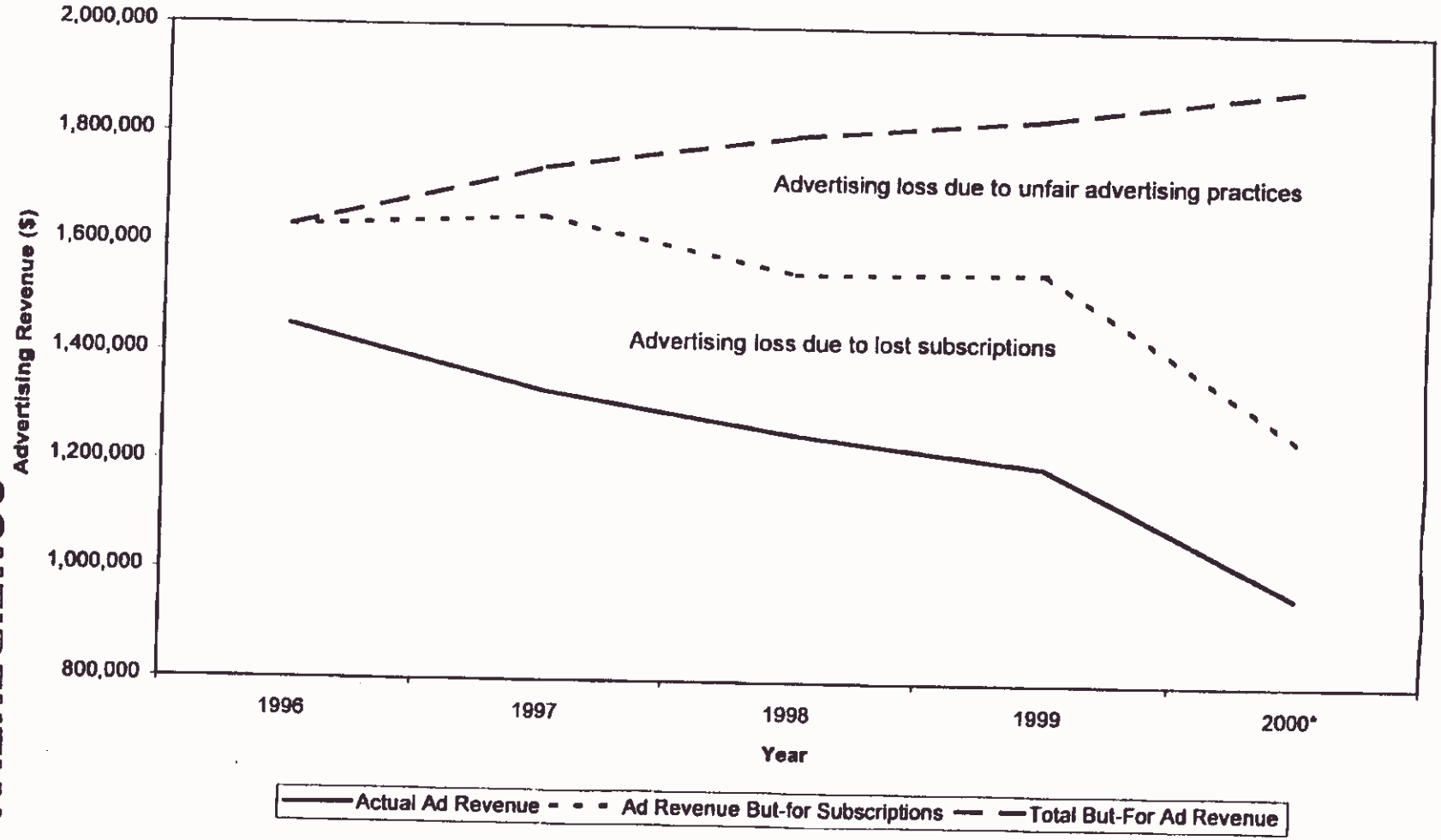
Figure 1
Waukesha Freeman Loss of Advertising Revenue



* The 2000 advertising numbers are projected through the end of the Journal's fiscal year.

Carl G. Degen

RESUME

September 2000

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Academic Background:

All course work necessary for Ph.D., University of Wisconsin-Madison, 1980, Economics
M.S., University of Wisconsin-Madison, 1979, Economics
B.S., University of Wisconsin-Parkside, 1977, Mathematics and Economics

Positions Held:

Senior Vice President, Laurits R. Christensen Associates, Inc., 1997-present
Vice President, Laurits R. Christensen Associates, Inc., 1992-1996
Senior Economist, Laurits R. Christensen Associates, Inc., 1990-1992
Economist, Laurits R. Christensen Associates, Inc., 1980-1990
Vice-President, Wisconsin Business Economics Association 1983-1984
Research Assistant, Economics, University of Wisconsin-Madison, 1978-1980
Teaching Assistant, Economics, University of Wisconsin-Madison, 1977-1978

Professional Experience:

Since joining Christensen Associates, I have worked extensively on projects for the U.S. Postal Service including productivity measurement and product costing. I have also worked on projects in the railroad industry. Over the last 10 years, I have had numerous expert witness assignments in postal rate cases and civil litigations involving intellectual property and other business disputes.

Professional Papers:

"Air Pollution and Mortality Rates: A Note on Lave and Seskin's Pooling of Cross-Section and Time Series Data," *Journal of Environmental Economics and Management*, Vol. 7, 1980, pp. 149-155 (with G. B. Christainson).

"Total Factor Productivity in the U.S. Electrical Machinery Industry," September 1981, (with L. R. Christensen, D. Cummings, and P. E. Schoech).

"United States Postal Service Capital Stock Estimates, 1962-1982," March 1983, (with D. C. Christensen, L. R. Christensen, and P. E. Schoech).

"United States Postal Service Measures of Output, Input, and Total Factor Productivity, 1963-1982," February 1984, (with D. C. Christensen, L. R. Christensen, and P. E. Schoech).

"United States Postal Service Measures of Real Output, Input, and Total Factor Productivity 1963-1984," October 1984, (with D. C. Christensen, L. R. Christensen, and P. E. Schoech).

"United States Postal Service Econometric Analysis of USPS Structure of Production and Total Factor Productivity, 1963-1983," November 1984, (with D. C. Christensen, L. R. Christensen, and P. E. Schoech).

"Data Base and Methodology for Economic Comparison of School Districts," February 1985, (with D. C. Christensen).

"Review of the Evidence for Urban/Rural Cost of Living Differentials in Wisconsin," February 1985, (with D. C. Christensen).

"The Role of Deregulation in Wisconsin's Economic Development," presented to the Wisconsin Strategic Development Commission, April 1985, (with L. R. Christensen).

"United States Postal Service Quarterly Real Output, Input, and Total Factor Productivity, 1982 1st Quarter Through 1986 1st Quarter," February 1986, (with D. C. Christensen, L. R. Christensen, and P. E. Schoech).

"United States Postal Service Productivity Budgeting Model Users Manual," June 1986.

"Total Factor Productivity at the MSC Level: Results for 1985," September 1986, (with D. C. Christensen, L. R. Christensen, and P. E. Schoech).

"Capital in the United States Postal Service," in *Technology and Capital Formation*, 1989, eds. Dale W. Jorgenson and Ralph Landau, MIT Press, Cambridge, (with D. C. Christensen, L. R. Christensen, and P. E. Schoech).

"TFP Presentation to Budgeting Group," December 3, 1992, (with D. C. Christensen and P. E. Schoech).

"Performance Analysis of Processing and Distribution Facilities: Sources of TFP Improvement," February 22, 1994, (with D. C. Christensen, K. L. Ehlinger, and P. E. Schoech).

Written supplemental direct testimony before the Postal Rate Commission, USPS-ST-12, in Docket No. R94-1, Postal Rate and Fee Changes (Reclassification of Second-Class Tallies).

Written direct testimony before the Postal Rate Commission, USPS-T-5 in Docket No. MC95-1, Classification Reform I (Letter Bundle Handling Survey and First-Class Mail Characteristics Study).

Written rebuttal testimony before the Postal Rate Commission, USPS-RT-9, in Docket No. MC95-1, Classification Reform-1 (Impact of Automation on First-Class Mail, The Impact of Postage Rates on Christmas Cards, and Alternative Volume Unit Cost Estimates for Publications).

Written direct testimony before the Postal Rate Commission, USPS-CT-2, in Docket No. MC96-2, Classification Reform II, Nonprofit (Classroom Mail).

Written direct testimony before the Postal Rate Commission, USPS-T-12, in Docket No. R97-1, Postal Rate and Fee Changes (New Costing Methods).

Written rebuttal testimony before the Postal Rate Commission, USPS-RT-6, in Docket No. R97-1, Postal Rate and Fee Changes (New Costing Methods).

Written direct testimony before the Postal Rate Commission, USPS-T-16, in Docket No. R2000-1, Postal Rate and Fee Changes (Mail Processing Costing Methods).

Written rebuttal testimony before the Postal Rate Commission, USPS-RT-6, in Docket No. R2000-1, Postal Rate and Fee Changes (Mail Processing Costing Methods and a Survey of Bound Printed Matter).

Appendix B
Deposition and Trial Testimony of Mr. Carl Degen for the Preceding Four Years

Date	Case Name	Client	Firm	Venue
2000	The Vollrath Company, LLC v. Crest Manufacturing, Inc	Crest	LaFollette, Godfrey & Kahn	U.S. District Ct., Western WI
2000	Matrix Formed Products, Inc. v. Lektrocorp, Inc.	Lektrocorp, Inc.	Kaufman and Payton	Oakland County, Cir. Ct. MI
2000	Baxter Healthcare Corp., et al. v. The Spectranetics Corp.	The Spectranetics Corp.	Rader, Fishman & Grauer	U.S. District Ct., Deleware
2000	ADCO Products Inc. v. Carlisle SynTec Incorporated	Carlisle SynTec Inc.	Rader, Fishman & Grauer	U.S. District Ct., Deleware
2000	Dana Corporation v. American Axle and Manufacturing	Dana Corporation	Rader, Fishman & Grauer	U.S. District Ct., Eastern MI
1999	Unipat, A.G. v. Sauer Inc., et al.	Sauer Inc., et al.	Veder, Price, Kaufman & Kamholz	U.S. District Ct., Deleware
1999	Lakeside Marina, Inc. v. Bayliner Marine Corp.	Lakeside Marina Inc.	Herrling, Clark	Winnebago County Cir. Ct., WI
1999	Paul E. Seus, et al., v. Rex Bieganek, et al.	Paul E. Seus	Stellpflug, Janssen, Nell & Hammer	Marinette County Cir. Ct., WI
1999	AmFab, Inc. v. Stryker Corporation	AmFab, Inc.	Rader, Fishman & Grauer	U.S. District Ct., Western MI
1999	Rich Products v. Kemutech	Kemutech	Godfrey & Kahn	U.S. District Ct., Eastern WI
1999	Builder's Best, Inc. v. Nemco, Inc. and John M Frey Co.	Nemco/Frey	Rader, Fishman & Grauer	U.S. District Ct., Western MI, Southern Div
1998	Behr Systems, Inc. v. Sames Electrostatic, Inc., et al.	Behr Systems, Inc.	Howard & Howard	U.S. District Ct., Eastern MI
1997	Trowelon v. Ruperts, et. al	Trowelon	McCarty, Curry, Wydeven, Peeters & Haak	Kewaunee County, Cir. Ct. WI
1996	Circuit City Stores, Inc. v. Office Max	Office Max	Rader, Fishman & Grauer	U.S. District Ct., Eastern VA

Appendix C
Documents Received by Christensen Associates

Beginning Bates Number	Ending Bates Number	Document Description
		1999 CIRCULATION FACTS, FIGURES AND LOGIC
		ADVERTISING GUIDES
		AMENDMENT TO PLAINTIFFS' FIRST SET OF INTERROGATORIES AND FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS JOURNAL COMMUNICATIONS AND JOURNAL SENTINEL INC
		ANSWER TO SECOND AMENDED COMPLAINT
		DEFENDANTS' FIRST DISCOVERY REQUESTS
		DEFENDANTS' SECOND DISCOVERY REQUESTS
		DEFENDANTS' THIRD DISCOVERY REQUESTS
		DEFENDANTS' FOURTH DISCOVERY REQUESTS
		DEFENDANTS' FIFTH DISCOVERY REQUESTS
		DEFENDANTS' RESPONSES TO PLAINTIFFS' SECOND REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANTS JOURNAL COMMUNICATIONS, INC. AND JOURNAL SENTINEL INC.
		DEFENDANTS' RESPONSES TO PLAINTIFFS' SECOND SET OF INTERROGATORIES TO DEFENDANTS JOURNAL COMMUNICATIONS, INC. AND JOURNAL SENTINEL INC.
		DEPOSITION OF HELEN S HOFFMAN
		DEPOSITION OF JEFFERY HOVIND
		DEPOSITION OF JONATHAN JOSSART
		DEPOSITION OF WAYNE TOSKE
		FREEMAN NEWSPAPERS CIRCULATION HISTORY 1987-2000
		HOUSEHOLD COUNTS
		INCREMENTAL COSTS OF ADDITIONAL ADS
		LETTER TEMPLATES TO SUBSCRIBERS FR CUSTOMER RETENTION MGR
		PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
		PLAINTIFFS' FIRST SET OF INTERROGATORIES TO DEFENDANTS
		PLAINTIFFS RESPONSES TO DEFENDANTS' FIRST DISCOVERY REQSTS
		PLAINTIFFS' RESPONSES TO DEFENDANTS' SECOND DISCOVERY RQST
		PLAINTIFFS RESPONSES TO DEFENDANTS THIRD DISCOVERY REQUEST
		PLAINTIFFS' RESPONSES TO DEFENDANTS' FOURTH DISCOVERY RQST
		PLAINTIFFS' SECOND REQUESTS FOR PRODUCTION OF DOCUMENTS
		PLAINTIFFS' SECOND SET OF INTERROGATORIES TO DEFENDANTS
		RESPONSES OF DEFENDANTS TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
		RESPONSES TO PLAINTIFFS' AMENDED FIRST INTERROGATORIES
		RESPONSES TO PLAINTIFFS' AMENDED FIRST RQSTS FOR DOC PROD
		RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES
		RETENTION SOLUTIONS
		SECOND AMENDED COMPLAINT
		THE 1999 COST AND REVENUE STUDY FOR DAILY NEWSPAPERS
		THE NAA SUBSCRIBER CHURN MANAGEMENT HANDBOOK
		WAUKESHA FREEMAN SALES 1996-2000

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Beginning Bates Number	Ending Bates Number	Document Description
D 0000403	D 0000409	WAUKESHA COUNTY MARKETING PLANS
D 0000736	D 0000757	EXPENSE REPORTS - 1998-99
D 0000769	D 0000774	ACTUAL VS PROFIT PLAN 1999
D 0000775	D 0000782	EXPENSE REPORTS - 1998-99
D 0001250	D 0001251	SALES COMPARATIVES AND DISCOUNT ANALYSIS
D 0001348	D 0001348	REVENUE PROFIT PLANNING - 1999
D 0001349	D 0001349	RPP - NET PAID ANALYSIS - 1999
D 0001350	D 0001350	REVENUE PROFIT PLANNING - 1999
D 0001406	D 0001415	REVENUE PROFIT PLANNING - 1999
D 0001457	D 0001457	REVENUE PROFIT PLANNING - 1999
D 0001458	D 0001458	RPP - NET PAID ANALYSIS - 1999
D 0001459	D 0001459	REVENUE PROFIT PLANNING - 1999
D 0001461	D 0001463	REVENUE PROFIT PLANNING - 1999
D 0001465	D 0001465	REVENUE PROFIT PLANNING - 1999
D 0004093	D 0004097	SALES COMPARATIVES AND DISCOUNT ANALYSIS
D 0004193	D 0004194	SALES COMPARATIVES AND DISCOUNT ANALYSIS
D 0004544	D 0004908	AUDIT REPORTS MILWAUKEE JOURNAL/SENTINEL 1990-1999
D 0004909	D 0004985	MILWAUKEE JOURNAL SENTINEL PUBLISHER'S STATEMENTS 1990-00
D 0004986	D 0004987	CIRCULATION TRENDS MILWAUKEE JOURNAL SENTINEL
D 0004988	D 0005067	MILWAUKEE JOURNAL SENTINEL PUBLISHER'S STATEMENTS 1990-99
D 0005070	D 0005070	CIRCULATION/NET PAIDS - 2000
D 0005104	D 0005104	RPP - NET PAID ANALYSIS - 1999
D 0005158	D 0005158	CIRCULATION - 1998-1999
D 0005207	D 0005207	CIRCULATION - 1993-1997
D 0005262	D 0005262	CIRCULATION - 1993-1997
D 0005298	D 0005299	CIRCULATION - 1993-1997
D 0005303	D 0005304	CIRCULATION - 1993-1997
D 0005308	D 0005310	CIRCULATION - 1993-1997
D 0005315	D 0005315	CIRCULATION - 1993-1997
D 0005318	D 0005318	CIRCULATION - 1993-1997
D 0005322	D 0005324	CIRCULATION - 1993-1997
D 0005332	D 0005334	CIRCULATION - 1993-1997
D 0005342	D 0005344	CIRCULATION - 1993-1997
D 0005352	D 0005354	CIRCULATION - 1993-1997
D 0005362	D 0005364	CIRCULATION - 1993-1997
D 0005371	D 0005373	CIRCULATION - 1993-1997
D 0005378	D 0005380	CIRCULATION - 1993-1997
D 0005385	D 0005387	CIRCULATION - 1993-1997
D 0005392	D 0005395	CIRCULATION - 1993-1997
D 0005399	D 0005401	CIRCULATION - 1993-1997
D 0005406	D 0005408	CIRCULATION - 1993-1997
D 0005413	D 0005415	CIRCULATION - 1993-1997
D 0005421	D 0005426	CIRCULATION - 1993-1997
D 0005428	D 0005430	CIRCULATION - 1993-1997
D 0005438	D 0005440	CIRCULATION - 1993-1997
D 0005447	D 0005449	CIRCULATION - 1993-1997
D 0005463	D 0005465	CIRCULATION - 1993-1997
D 0005479	D 0005481	CIRCULATION - 1993-1997

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D 0005489	D 0005491	CIRCULATION - 1993-1997
D 0005498	D 0005500	CIRCULATION - 1993-1997
D 0005505	D 0005507	CIRCULATION - 1993-1997
D 0005512	D 0005514	CIRCULATION - 1993-1997
D 0005526	D 0005634	CIRCULATION - 1998-1999
D 0005648	D0005648	WAUKESHA COUNTY MARKETING PLANS
D 0005661	D 0005661	WAUKESHA COUNTY MARKETING PLANS
D 0005674	D 0005674	WAUKESHA COUNTY MARKETING PLANS
D 0005686	D 0005686	WAUKESHA COUNTY MARKETING PLANS
D 0005699	D 0005699	WAUKESHA COUNTY MARKETING PLANS
D 0005712	D 0005712	WAUKESHA COUNTY MARKETING PLANS
D 0005725	D 0005725	WAUKESHA COUNTY MARKETING PLANS
D 0005738	D 0005738	WAUKESHA COUNTY MARKETING PLANS
D 0005750	D 0005750	WAUKESHA COUNTY MARKETING PLANS
D 0005763	D 0005763	WAUKESHA COUNTY MARKETING PLANS
D 0005769	D 0005769	WAUKESHA COUNTY MARKETING PLANS
D 0005776	D 0005776	WAUKESHA COUNTY MARKETING PLANS
D 0005783	D 0005784	REVENUE/PROFIT TABLES
D 0005785	D 0005789	JOURNAL SENTINEL CIRCULATION
D 0005792	D 0005792	RPP - NET PAID ANALYSIS - 1999
D 0005794	D 0005794	CIRCULATION - 1998-1999
D 0005795	D 0005795	RPP - NET PAID ANALYSIS - 1999
D 0005796	D 0005796	SALES COMPARATIVES AND DISCOUNT ANALYSIS
D 0005803	D 0005805	CIRCULATION - 1998-1999
D 0005926	D 0005927	WAUKESHA COUNTY MARKETING PLANS
D 0005966	D 0005970	WAUKESHA COUNTY MARKETING PLANS
D 0005972	D 0005972	MARKET SHARE MEASURES
D 0006054	D 0006055	WAUKESHA COUNTY MARKETING PLANS
D 0006072	D 0006076	WAUKESHA COUNTY MARKETING PLANS
D 0006154	D 0006154	WAUKESHA COUNTY MARKETING PLANS
D 0006161	D 0006161	WAUKESHA COUNTY MARKETING PLANS
D 0006306	D 0006306	RPP - NET PAID ANALYSIS - 1999
D 0006309	D 0006309	RPP - NET PAID ANALYSIS - 1999
D 0006328	D 0006328	CIRCULATION - 1998-1999
D 0006332	D 0006332	CIRCULATION - 1998-1999
D 0006336	D 0006337	CIRCULATION - 1998-1999
D 0006348	D 0006348	CIRCULATION - 1998-1999
D 0006358	D 0006358	CIRCULATION - 1998-1999
D 0006707	D 0006707	ADVERTISING REVENUE TABLES
D 0006709	D 0006711	ADVERTISING REVENUE TABLES
D 0006712	D 0006747	JOURNAL COMMUNICATIONS ANNUAL REPORT 1997
D 0006832	D 0006832	ADVERTISING REVENUE TABLES
D 0006837	D 0006837	ADVERTISING REVENUE TABLES
D 0006841	D 0006842	ADVERTISING REVENUE TABLES
D 0006846	D 0006846	ADVERTISING REVENUE TABLES
D 0006849	D 0006850	ADVERTISING REVENUE TABLES
D 0006854	D 0006854	ADVERTISING REVENUE TABLES
D 0006859	D 0006860	ADVERTISING REVENUE TABLES

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D 0006864	D 0006864	ADVERTISING REVENUE TABLES
D 0006868	D 0006869	ADVERTISING REVENUE TABLES
D 0006873	D 0006873	ADVERTISING REVENUE TABLES
D 0006883	D 0006883	ADVERTISING REVENUE TABLES
D 0006888	D 0006889	ADVERTISING REVENUE TABLES
D 0006897	D 0006898	ADVERTISING REVENUE TABLES
D 0006902	D 0006902	ADVERTISING REVENUE TABLES
D 0006905	D 0006906	ADVERTISING REVENUE TABLES
D 0006910	D 0006910	ADVERTISING REVENUE TABLES
D 0006915	D 0006916	ADVERTISING REVENUE TABLES
D 0006920	D 0006920	ADVERTISING REVENUE TABLES
D 0006925	D 0006925	ADVERTISING REVENUE TABLES
D 0006929	D 0006930	ADVERTISING REVENUE TABLES
D 0006934	D 0006934	ADVERTISING REVENUE TABLES
D 0006938	D 0006939	ADVERTISING REVENUE TABLES
D 0006943	D 0006943	ADVERTISING REVENUE TABLES
D 0006947	D 0006948	ADVERTISING REVENUE TABLES
D 0006952	D 0006952	ADVERTISING REVENUE TABLES
D 0006958	D 0006958	ADVERTISING REVENUE TABLES
D 0006962	D 0006963	ADVERTISING REVENUE TABLES
D 0006967	D 0006967	ADVERTISING REVENUE TABLES
D 0006971	D 0006972	ADVERTISING REVENUE TABLES
D 0006976	D 0006976	ADVERTISING REVENUE TABLES
D 0006982	D 0006982	ADVERTISING REVENUE TABLES
D 0006986	D 0006987	ADVERTISING REVENUE TABLES
D 0006991	D 0006991	ADVERTISING REVENUE TABLES
D 0006995	D 0006996	ADVERTISING REVENUE TABLES
D 0007000	D 0007000	ADVERTISING REVENUE TABLES
D 0007004	D 0007005	ADVERTISING REVENUE TABLES
D 0007009	D 0007009	ADVERTISING REVENUE TABLES
D 0007014	D 0007015	ADVERTISING REVENUE TABLES
D 0007019	D 0007019	ADVERTISING REVENUE TABLES
D 0007025	D 0007025	ADVERTISING REVENUE TABLES
D 0007029	D 0007030	ADVERTISING REVENUE TABLES
D 0007034	D 0007034	ADVERTISING REVENUE TABLES
D 0007041	D 0007041	ADVERTISING REVENUE TABLES
D 0007047	D 0007048	ADVERTISING REVENUE TABLES
D 0007052	D 0007052	ADVERTISING REVENUE TABLES
D 0007093	D 0007095	ADVERTISING REVENUE TABLES
D 0007098	D 0007098	ADVERTISING REVENUE JOURNAL SENTINEL
D 0007115	D 0007117	WAUKESHA COUNTY MARKETING PLANS
D 0007140	D 0007140	WAUKESHA COUNTY MARKETING PLANS
D 0007212	D 0007212	MARKET SHARE MEASURES
D 0007241	D 0007241	NET PAID ANALYSIS - 1998
D 0007888	D 0007888	REVENUE PROFIT PLANNING - 1999
D 0007893	D 0007893	RPP - NET PAID ANALYSIS - 1999
D 0007894	D 0007914	REVENUE PROFIT PLANNING - 1999
D 0008223	D 0008244	EXPENSE REPORTS - 1998-99

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D 0009118	D 0009119	1990-1991 BUDGET SALES PRODUCTION RECAP
D 0009129	D 0009129	SALES COMPARATIVES AND DISCOUNT ANALYSIS
D 0009130	D 0009130	PERIOD AVERAGE SALES COMPARATIVES
D 0009253	D 0009253	PERIOD AVERAGE SALES COMPARATIVES
D 0009451	D 0009451	PERIOD AVERAGE SALES COMPARATIVES
D 0009498	D 0009498	PERIOD AVERAGE SALES COMPARATIVES
D 0009665	D 0009666	WAUKESHA COUNTY MARKETING PLANS
D 0009816	D 0009816	1992 BUDGET SALES PRODUCTION RECAP
D 0009825	D 0009825	PERIOD AVERAGE SALES COMPARATIVES
D 0009828	D 0009830	DISCOUNT ANALYSIS 1989-1993
D 0009838	D 0009838	CIRCULATION - 1998-1999
D 0009840	D 0009844	CIRCULATION - 1998-1999
D 0009892	D 0009892	1998 RETAIL SALES PROJECTIONS MILWAUKEE JOURNAL SENTINEL
D 0009894	D 0009894	1998 RETAIL SALES PROJECTIONS MILWAUKEE JOURNAL SENTINEL
D 0009913	D 0009913	WAUKESHA COUNTY MARKETING PLANS
D 0009928	D 0009928	CIRCULATION - 1998-1999
D 0009985	D 0009985	1998 RETAIL SALES PROJECTIONS MILWAUKEE JOURNAL SENTINEL
D 0010003	D 0010003	WAUKESHA COUNTY MARKETING PLANS
D 0010109	D 0010114	NET PAID ANALYSIS - 1997-96
D 0010216	D 0010216	WAUKESHA COUNTY MARKETING PLANS
D 0010217	D 0010306	MILW JOURNAL SENTINEL CIRCULATION MKTG PLANS 1998 EX 50
D 0010492	D 0010492	REVENUE/PROFIT TABLES
D 0010670	D 0010670	NET PAID ANALYSIS - 1997-96
D 0010685	D 0010685	PERIOD AVERAGE SALES COMPARATIVES SENTINEL
D 0010777	D 0010777	CIRCULATION - 1993-1997
D 0010812	D 0010812	1995 DISCOUNT ANALYSIS
D 0010958	D 0010958	1994 BUDGET/ORDER PRODUCTION RECAP
D 0010967	D 0010967	PERIOD AVERAGE SALES COMPARATIVES SENTINEL
D 0010969	D 0010969	DISCOUNT ANALYSIS DAILY JOURNAL 1990-1994
D 0010971	D 0010971	DISCOUNT ANALYSIS SENTINEL 1990-1994
D 0011045	D 0011045	CIRCULATION - 1998-1999
D 0011047	D 0011047	NET PAID ANALYSIS - 1998
D 0011053	D 0011056	NET PAID ANALYSIS - 1998
D 0011402	D 0011402	PERIOD AVERAGE SALES COMPARATIVES SENTINEL
D 0011404	D 0011404	DISCOUNT ANALYSIS DAILY JOURNAL 1989-1993
D 0011406	D 0011406	DISCOUNT ANALYSIS SENTINEL 1989-1993
D 0011570	D 0011570	DISCOUNT ANALYSIS DAILY JOURNAL 1990-1994
D 0011572	D 0011572	DISCOUNT ANALYSIS SENTINEL 1990-1994
D 0011573	D 0011573	PERIOD AVERAGE SALES COMPARATIVES SENTINEL
D 0011593	D 0011593	PERIOD AVERAGE SALES COMPARATIVES SENTINEL
D 0011687	D 0011687	CIRCULATION - 1993-1997
D 0011689	D 0011689	CIRCULATION - 1993-1997
D 0011727	D 0011728	1994-1995 DISCOUNT ANALYSIS
D 0011814	D 0012058	MILW JRNL SENTINEL CIRCULATION MKTG PLANS 1999-00 EX 52-53
D 0011823	D 0011823	CIRCULATION - 1998-1999
D 0011824	D 0011828	RPP - NET PAID ANALYSIS - 1999
D 0011840	D 0011841	CIRCULATION - 1998-1999
D 0011934	D 0011935	CIRCULATION/NET PAIDS - 2000

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D 0011950	D 0011950	CIRCULATION/NET PAIDS - 2000
D 0011951	D 0011956	REVENUE/PROFIT TABLES
D 0011971	D 0011972	WAUKESHA COUNTY MARKETING PLANS
D 0011989	D 0011989	SALES BY PROMOTIONAL RATE 2000 MARKETING PLAN
D 0011991	D 0011991	WAUKESHA COUNTY MARKETING PLANS
D 0012047	D 0012047	CIRCULATION/NET PAIDS - 2000
D 0012086	D 0012086	REVENUE/PROFIT TABLES
D 0012088	D 0012089	ADVERTISING REVENUE TABLES
D 0012200	D 0012200	WAUKESHA COUNTY MARKETING PLANS
D 0012292	D 0012292	ADVERTISING REVENUE TABLES
D 0012301	D 0012301	ADVERTISING REVENUE TABLES
D 0012650	D 0012658	WAUKESHA COUNTY MARKETING PLANS
D 0012666	D 0012667	WAUKESHA COUNTY MARKETING PLANS
D 0013089	D 0013089	WAUKESHA COUNTY MARKETING PLANS
D 0013274	D 0013279	WAUKESHA COUNTY MARKETING PLANS
D 0013323	D 0013324	WAUKESHA COUNTY MARKETING PLANS
D 0013451	D 0013451	WAUKESHA COUNTY MARKETING PLANS
D 0013455	D 0013455	WAUKESHA COUNTY MARKETING PLANS
D 0013458	D 0013463	WAUKESHA COUNTY MARKETING PLANS
D 0013487	D 0013488	WAUKESHA COUNTY MARKETING PLANS
D 0013532	D 0013532	WAUKESHA COUNTY MARKETING PLANS
D 0013852	D 0013852	WAUKESHA COUNTY MARKETING PLANS
D 0013927	D 0013927	CIRCULATION - 1993-1997
D 0014076	D 0014093	WAUKESHA COUNTY MARKETING PLANS
D 0014136	D 0014138	WAUKESHA COUNTY MARKETING PLANS
D 0014143	D 0014143	WAUKESHA COUNTY MARKETING PLANS
D 0014173	D 0014176	WAUKESHA COUNTY MARKETING PLANS
D 0014336	D 0014361	NET PAID ANALYSIS - 1998
D 0014785	D 0014786	REVENUE/PROFIT TABLES
D 0014787	D 0014787	ADVERTISING REVENUE TABLES
D 0014788	D 0014789	REVENUE/PROFIT TABLES
D 0014790	D 0014790	ADVERTISING REVENUE TABLES
D 0014791	D 0014791	NET PAID ANALYSIS - 1998
D 0014792	D 0014793	REVENUE/PROFIT TABLES
D 0014794	D 0014794	ADVERTISING REVENUE TABLES
D 0014795	D 0014796	REVENUE/PROFIT TABLES
D 0014797	D 0014797	ADVERTISING REVENUE TABLES
D 0014798	D 0014799	REVENUE/PROFIT TABLES
D 0014800	D 0014800	ADVERTISING REVENUE TABLES
D 0014801	D 0014802	REVENUE/PROFIT TABLES
D 0014803	D 0014803	ADVERTISING REVENUE TABLES
D 0014804	D 0014804	REVENUE/PROFIT TABLES
D 0014805	D 0014806	ADVERTISING REVENUE TABLES
D 0014807	D 0014808	REVENUE/PROFIT TABLES
D 0014809	D 0014809	ADVERTISING REVENUE TABLES
D 0014810	D 0014811	REVENUE/PROFIT TABLES
D 0014812	D 0014812	ADVERTISING REVENUE TABLES
D 0014813	D 0014813	REVENUE/PROFIT TABLES

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D 0014814	D 0014814	ADVERTISING REVENUE TABLES
D 0014815	D 0014817	REVENUE/PROFIT TABLES
D 0014818	D 0014818	ADVERTISING REVENUE TABLES
D 0014819	D 0014820	REVENUE/PROFIT TABLES
D 0014821	D 0014821	ADVERTISING REVENUE TABLES
D 0014822	D 0014823	REVENUE/PROFIT TABLES
D 0014824	D 0014824	ADVERTISING REVENUE TABLES
D 0014825	D 0014826	REVENUE/PROFIT TABLES
D 0014827	D 0014827	ADVERTISING REVENUE TABLES
D 0014828	D 0014829	REVENUE/PROFIT TABLES
D 0014830	D 0014830	ADVERTISING REVENUE TABLES
D 0014831	D 0014832	REVENUE/PROFIT TABLES
D 0014833	D 0014833	ADVERTISING REVENUE TABLES
D 0014834	D 0014835	REVENUE/PROFIT TABLES
D 0014836	D 0014836	ADVERTISING REVENUE TABLES
D 0014837	D 0014838	REVENUE/PROFIT TABLES
D 0014839	D 0014839	ADVERTISING REVENUE TABLES
D 0014840	D 0014841	REVENUE/PROFIT TABLES
D 0014842	D 0014842	ADVERTISING REVENUE TABLES
D 0014843	D 0014844	REVENUE/PROFIT TABLES
D 0014845	D 0014845	ADVERTISING REVENUE TABLES
D 0014846	D 0014847	REVENUE/PROFIT TABLES
D 0014848	D 0014848	ADVERTISING REVENUE TABLES
D 0014849	D 0014850	REVENUE/PROFIT TABLES
D 0014851	D 0014851	ADVERTISING REVENUE TABLES
D 0014852	D 0014856	WAUKESHA COUNTY MARKETING PLANS
D 0014857	D 0014857	REVENUE/PROFIT TABLES
D 0014858	D 0014858	ADVERTISING REVENUE TABLES
D 0014859	D 0014861	REVENUE/PROFIT TABLES
D 0014862	D 0014862	ADVERTISING REVENUE TABLES
D 0014863	D 0014864	REVENUE/PROFIT TABLES
D 0014865	D 0014865	ADVERTISING REVENUE TABLES
D 0014866	D 0014867	REVENUE/PROFIT TABLES
D 0014868	D 0014869	ADVERTISING REVENUE TABLES
D 0014870	D 0014870	REVENUE/PROFIT TABLES
D 0014871	D 0014871	ADVERTISING REVENUE TABLES
D 0014872	D 0014874	REVENUE/PROFIT TABLES
D 0014875	D 0014875	ADVERTISING REVENUE TABLES
D 0014876	D 0014877	REVENUE/PROFIT TABLES
D 0014878	D 0014878	ADVERTISING REVENUE TABLES
D 0015531	D 0015533	REVENUE/PROFIT TABLES
D 0015542	D 0015543	PERIOD AVERAGE SALES COMPARATIVES - DAILY
D 0015561	D 0015566	NET PAID ANALYSIS - 1998
D 0015630	D 0015630	ADVERTISING REVENUE TABLES
D 0015666	D 0015666	ADVERTISING REVENUE TABLES
D 0015686	D 0015686	ADVERTISING REVENUE TABLES
D 0015698	D 0015698	ADVERTISING REVENUE TABLES
D 0015704	D 0015704	ADVERTISING REVENUE TABLES

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D 0015720	D 0015720	ADVERTISING REVENUE TABLES
D 0015770	D 0015770	ADVERTISING REVENUE TABLES
D 0015836	D 0015836	ADVERTISING REVENUE TABLES
D 0015849	D 0015849	ADVERTISING REVENUE TABLES
D 0015865	D 0015865	ADVERTISING REVENUE TABLES
D 0015895	D 0015895	ADVERTISING REVENUE TABLES
D 0015901	D 0015901	ADVERTISING REVENUE TABLES
D 0015921	D 0015921	ADVERTISING REVENUE TABLES
D 0015948	D 0015948	ADVERTISING REVENUE TABLES
D 0015983	D 0015983	ADVERTISING REVENUE TABLES
D 0016034	D 0016034	ADVERTISING REVENUE TABLES
D 0016085	D 0016085	ADVERTISING REVENUE TABLES
D 0016088	D 0016088	ADVERTISING REVENUE TABLES
D0012291	D0012291	MARKET SHARE MEASURES
D0016670	D0016878	JOURNAL COMMUNICATIONS ANNUAL REPORTS 1995-1999
D0016879	D0017077	JOURNAL COMMUNICATIONS SEC FORM 10-K 1995-1999
D0017078	D0017393	JOURNAL COMMUNICATIONS SEC FORM 10-Q 1995-2000
D0017394	D0017487	MILWAUKEE JOURNAL SENTINEL ADVERTISING RATES
D0017488	D0017618	DARROW AUTOMOTIVE GROUP ADVERTISING
D0017623	D0017935	DARROW AUTOMOTIVE GROUP ADVERTISING
D0017936	D0018089	HEISER ADVERTISING
D0018090	D0018168	BOUCHER ADVERTISING
D0018169	D0018244	ERNIE VON SCHLEDORN ADVERTISING
D0018245	D0018360	WILDE DEALER GROUP ADVERTISING
D0018361	D0018366	HOME DEPOT/MILWAUKEE JOURNAL SENTINEL ADVERTISING CONTRACT
D0018367	D0018375	TARGET/MILWAUKEE JOURNAL SENTINEL ADVERTISING CONTRACTS
D0018376	D0018624	FLEMING/SUPER SAVER/SENTRY ADVERTISING
D0018625	D0018665	AUDIT REPORT/MILWAUKEE JOURNAL SENTINEL MARCH 31, 2000
D0018666	D0018711	TELEMARKETING WEEK-ENDING REPORTS 1999-2000
D0018712	D0018745	CIRCULATION DEPARMENT SECOND QUARTER 2000 REVIEW
D0018746	D0018872	CIRCULATION MARKETING PLAN 2001
D0018873	D0019262	RATE CARD EXCEPTION FORMS
D0019271	D0020030	RATE CARD EXCEPTION FORMS
D0020031	D0020133	WAUKESHA READER SURVEY OCTOBER 1996
D0020134	D0020200	WAUKESHA COUNTY MARKETING
D0020201	D0020274	TOM PIERCE'S WAUKESHA MEDIA FILE
D0020275	D0020308	ZONES
D0020309	D0020327	METROPOLITAN AREA OUTLOOK
D0020328	D0020337	1996 DEMOGRAPHIC REPORT
D0020338	D0020365	1996 ZIP REPORT FOR WAUKESHA COUNTY
D0020366	D0020400	WAUKESHA FREEMAN
D0020401	D0020455	MILWAUKEE JOURNAL SENTINEL MARKETING PLANS
D0020456	D0020622	JOURNAL COMMUNICATIONS MARKETING
D0020623	D0020719	AUDIT BUREAU OF CIRCULATIONS CORRESPONDENCE
D0020720	D0020927	READER/ADVERTISER RESEARCH
D0020928	D0021382	READER/ADVERTISER STUDIES
D0021383	D0021565	2000 CONSUMER ANALYSIS

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D0021566	D0022251	ADVERTISING DATA SCAN ADS NEWSPAPER REPORT 1996-1997
D0022252	D0022282	JOURNAL SENTINEL OPERATING PROFIT SUMMARY/INCOME STATEMENT
D0022283	D0022563	KOHL'S ADVERTISING
D0022564	D0022617	JEWEL - OSCO ADVERTISING
D0022618	D0022792	PICK 'N SAVE
D0022793	D0022794	ADVERTISING DEPARTMENT ORGANIZATIONAL CHART
D0022795	D0022859	DEPARTMENT OF JUSTICE CORRESPONDENCE-CNI ACQUISITION
D0022860	D0022883	COMMUNITY NEWSPAPERS INC ACQUISITION
D0022884	D0022952	CONLEY PUBLISHING GROUP-CNI ACQUISITION
D0022953	D0022988	KEITH SPORE FILE
D0022989	D0022992	CIVIL INVESTIGATIVE DEMAND 17294
D0022993	D0023124	CORRESPONDENCE-CNI ACQUISITION
D0023125	D0023409	DEPARTMENT OF JUSTICE CORRESPONDENCE-CNI ACQUISITION
D0023410	D0023481	DEPARTMENT OF JUSTICE REQUEST FOR PRODUCTION OF MATERIALS
D0023482	D0023564	SUNMEDIA CORP CORRESPONDENCE/FINANCIAL DATA
D0023565	D0023627	STOCK PURCHASE AGREEMENT
D0023628	D0023637	JOURNAL COMMUNICATIONS CODE OF ETHICS
D0023638	D0023993	DEPARTMENT OF JUSTICE DEPOSITION AND EXHIBITS-STEVE HUHTA
D0023994	D0024020	TOM PIERCE'S FREEMAN FILE
D0024021	D0024162	K GROUP/PRICING
D0024163	D0024165	CENTRAL FILES RETENTION SCHEDULE
D0024199	D0024315	WAUKESHA MARKETING
D0024316	D0024320	ATTEMPTS TO WIN ADVERTISERS FROM OTHER COMPANIES
D0024321	D0024322	MILWAUKEE JOURNAL SENTINEL ADVERTISING
D0024323	D0024325	MONTHLY REPORTS/WEEKLY REPORTS
D0024326	D0024331	JOURNAL SENTINEL/COMPARISON OF AD REVENUE
D0024332	D0024332	JOURNAL SENTINEL DETAIL CLASSIFIED ADVERTISING REPORT
D0024333	D0024338	SUNMEDIA CORPORATION PRICE AND VOLUME HISTORY/ADVERTISING
D0024339	D0024340	SUNMEDIA CORPORATION THIS WEEK! PUBLICATIONS
D0024341	D0024360	JOURNAL SENTINEL 20 LARGEST ADVERTISERS
D0024361	D0024366	JOURNAL SENTINEL ACCOUNTS BY REVENUE
D0024367	D0024371	TOP 25 CUSTOMER ANALYSIS SUMMARY COMPARISONS 1998
D0024372	D0024373	SUNMEDIA CORP TOP 10 DISPLAY AND CLASSIFIED ADVERTISERS
D0024374	D0024379	TOP 20 AUTO ACCOUNTS
D0024380	D0024408	ADVERTISING MARKET SHARE
D0024409	D0024506	THE MEDIA AUDIT SUMMER 1997
D0024507	D0024510	WAUKESHA COUNTY STRATEGY MEETING MINUTES 6/27/97
D0024511	D0024511	PROTOTYPE FOR MONTHLY PUBLICATION MEMO DATED JULY 3, 1997
D0024512	D0024516	WAUKESHA COUNTY STRATEGY MEETING MINUTES 5/27/97
D0024517	D0024519	WAUKESHA COUNTY JCI CIRCULATION ANALYSIS BY ZONE
D0024520	D0024520	JOURNAL SENTINEL/ADD INC. COMBO SUBSCRIPTION BUYS
D0024521	D0024522	WAUKESHA COUNTY STRATEGY MEETING MINUTES 5/12/97
D0024523	D0024523	MEETING TO DISCUSS CORPORATE BUSINESS STRATEGY MEMO
D0024524	D0024524	WAUKESHA COUNTY JCI CIRCULATION ANALYSIS BY ZONE
D0024525	D0024554	WAUKESHA COUNTY STRATEGY MEETING MINUTES
D0024555	D0024556	MEETING TO DISCUSS CORPORATE BUSINESS STRATEGY MEMO
D0024557	D0024557	WAUKESHA COUNTY TOTAL NEWSPAPER DESIGNATED MARKET
D0024558	D0024558	WAUKESHA COUNTY STRATEGY MEETING AGENDA 7/30/97

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D0024559	D0024794	JSI STRATEGIC PLAN 1998
D0024795	D0024971	JSI STRATEGIC PLAN 1996
D0024972	D0025071	JSI STRATEGIC PLAN 1997 (FINANCIAL)
D0025072	D0025298	JSI STRATEGIC PLAN 1997
D0025299	D0025306	TOP ADVERTISERS
D0025307	D0025434	MANAGEMENT SUMMARY REPORT 1994 VOLUME II
D0025435	D0025503	INTERIM SUMMARY REPORT JUNE 1994
D0025504	D0025685	MANAGEMENT SUMMARY REPORT 1994 VOLUME I
D0025687	D0025755	WAUKESHA READER SURVEY OCTOBER 1996
D0025756	D0025795	WAUKESHA ADVERTISER SURVEY JANUARY 1997
D0025797	D0025801	WAUKESHA ADVERTISER SURVEY JANUARY 1997
D0025802	D0025802	JOURNAL SENTINEL/ADD INC COMBO SUBSCRIPTION BUYS
D0025803	D0025809	WAUKESHA COUNTY STRATEGY MEETING MINUTES
D0025810	D0025812	MARKETING PLAN IMPLEMENTATION SCHEDULE
D0025813	D0025815	MILWAUKEE JOURNAL SENTINEL ADS
D0025817	D0025822	WAUKESHA COUNTY STRATEGY MEETING MINUTES 5/12/97 & 7/30/97
D0025823	D0025823	PROTOTYPE FOR MONTHLY PUBLICATION MEMO DATED JULY 3, 1997
D0025824	D0025824	STAFFING COMPARISONS
D0025825	D0025840	METROPOLITAN AREA OUTLOOK/DEMOGRAPHICS
D0025841	D0025843	WAUKESHA COUNTY JCI CIRCULATION ANALYSIS BY ZONE
D0025844	D0025849	1996 ZIP REPORT FOR WAUKESHA COUNTY RANKED BY HOME VALUE
D0025850	D0025853	WAUKESHA NICHE PUBLICATION ADVERTISING
D0025854	D0025857	MONTHLY PUBLICATION PROPOSAL
D0025858	D0025858	HOUSEHOLD COUNTS FOR WAUKESHA LIFESTYLE PUBLICATION MEMO
D0025859	D0025864	1996 ZIP REPORT FOR WAUKESHA COUNTY RANKED BY HOME VALUE
D0025865	D0025865	ADVERTISING ACCOUNTS WITH INTEREST IN UPSCALE MAGAZINE
D0025866	D0025873	MARKETPLACE MAGAZINE
D0025874	D0025878	ANALYSIS OF VALUE TO PURCHASER OF A 338 H10 ELECT FOR CNI
D0025879	D0025888	SUNMEDIA VISIT NOTES
D0025889	D0026052	CNI NEWSPAPERS CIRCULATION DEPARTMENT
D0026053	D0026105	THE 1997 SCARBOROUGH REPORT
D0026106	D0026158	THE 1996 SCARBOROUGH REPORT
D0026159	D0026272	MILWAUKEE MARKET STUDY SCARBOROUGH RE-CONTACT INTERVIEWS
D0026273	D0026299	CNI CIRCULATION/REVENUE/ADVERTISING
D0026300	D0026343	SUNMEDIA FOLEY & LARDNER
D0026344	D0026349	ADS NEWSPAPER REPORT CORRESPONDENCE
D0026350	D0026354	TOP ADVERTISERS 1996-1997
D0026355	D0026358	CNI 1997 TRADE/CASH SUMMARY
D0026359	D0026372	JOURNAL COMMUNICATIONS PROXY STATEMENTS
D0026373	D0026408	JOURNAL COMMUNICATIONS 1995 ANNUAL REPORT
D0026409	D0026444	JOURNAL COMMUNICATIONS 1996 ANNUAL REPORT
D0026445	D0026467	JOURNAL COMMUNICATIONS 10-K REPORT 1996
D0026468	D0026495	JOURNAL COMMUNICATIONS 10-Q REPORT 1995-1996
D0026496	D0026498	EDITOR & PUBLISHER HOME RETAIL ADVERTISING
D0026499	D0026536	CNI NEWSPAPERS 1997 RETAIL RATES/MEDIA SUMMARY/MEDIA AUDIT
D0026537	D0026537	SPECIFICATION 10 DUE DILIGENCE STUDIES AND FINANCIAL MODEL
D0026538	D0026562	SUNMEDIA CORP CONFIDENTIAL INFORMATION MEMORANDUM
D0026564	D0026602	SUNMEDIA CORP CONFIDENTIAL INFORMATION MEMORANDUM

Beginning Bates Number	Ending Bates Number	Document Description
D0026604	D0026614	SUNMEDIA CORP CONFIDENTIAL INFORMATION MEMORANDUM
D0026615	D0026642	COMMUNITY NEWSPAPERS INC - CNI
D0026643	D0026654	THIS WEEK PUBLICATIONS
P 000001	P 000196	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1987
P 000197	P 000329	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1988
P 000331	P 000368	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1988
P 000369	P 000538	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1989
P 000539	P 000699	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1990
P 000700	P 000893	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1991
P 000894	P 001055	WAUKESHA FREEMAN MONTHLY CIRCULATION REPORTS 1992
P 001057	P 001061B	WAUKESHA FREEMAN MONTHLY CIRCULATION REPORTS 1992
P 001062	P 001063	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1993
P 001065	P 001418	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1993
P 001419	P 001519	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1994
P 001521	P 001609	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1994
P 001610	P 001645	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1995
P 001646	P 001681	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1996
P 001682	P 001717	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1997
P 001718	P 001754	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1998
P 001755	P 001790	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 1999
P 001791	P 001796	WAUKESHA COUNTY FREEMAN MONTHLY CIRCULATION REPORTS 2000
P 001797	P 001823	SURVEY RESULTS
P 001824	P 001837	WAUKESHA COUNTY FREEMAN LINAGE REPORTS 1990-2000
P 001838	P 001860	FINANCIAL STATEMENTS
P 001861	P 002125	WAUKESHA FREEMAN NEWSPAPER PUBLISHER'S STATEMENTS 1979-99
P 002126	P 002149	WAUKESHA FREEMAN STATEMENTS OF OWNERSHIP, MGMT AND CIRC
P002150	P002151	THE FREEMAN PROMOTIONAL PAYMENT/STOPPED SUBSCRIBERS REPORT
P002152	P002154	CIRCULATION RATES
P002155	P002170	RATE TERMS INFORMATION
P002171	P002174	THE FREEMAN PROMOTIONAL PAYMENT AUDIT REPORT 1996-2000
P002175	P002191	FREEMAN/OCONOMOWOC ENTERPRISE OVERLAP ROUTES 5-18-00
P002192	P002200	WAUKESHA FREEMAN MARKETING
P002202	P002249	WAUKESHA FREEMAN MARKETING
P006315	P006373	WAUKESHA FREEMAN ZIP CODE SUBSET
P006374	P006468	WAUKESHA FREEMAN READER SURVEY
P006470	P006527	WAUKESHA FREEMAN READER SURVEY
P006528	P006533	WAUKESHA COUNTY, WI NON-READER SURVEY
P006534	P006624	LAKE COUNTRY FREEMAN

Valuation of

Waukesha County (WI) Freeman

As of September 30, 2000

Prepared by
Dirks, Van Essen & Murray

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1. EXECUTIVE SUMMARY

Dirks, Van Essen & Murray was engaged to value the Waukesha County (WI) Freeman as of September 30, 2000, with its current circulation of 16,319, and to separately value a pro forma Freeman newspaper assuming a higher circulation of 21,194. We conclude that the following amounts represent reasonable and conservative estimates of the fair-market values of each:

- Waukesha County Freeman, circulation 16,319 -- $ 7,645,238.
- Waukesha County Freeman, circulation 21,194 -- $11,498,305.

To arrive at the two values, we used a discounted cash flow analysis, which recognizes that the value of an enterprise is based upon the future cash flows that accrue to the owner. For the Freeman with circulation of 21,194, certain assumptions were made about advertising and circulation revenue for the newspaper if the circulation existed at this higher level. To find the present value of the future cash flows, a discount rate was used based on the data of publicly traded newspaper companies.

In both cases, the values represent approximately 10 times earnings before interest, taxes, depreciation, and amortization (EBITDA). This multiple is consistent with the prices paid in the current private market for daily newspapers of this size operating in suburban markets. Having handled the sale of more than 70 daily newspapers during 2000 alone, Dirks, Van Essen & Murray is very familiar with the private marketplace.

2. DESCRIPTION OF ASSIGNMENT

Dirks, Van Essen & Murray was engaged to determine the fair-market value of the Waukesha County (WI) Freeman daily newspaper and its related publications as of September 30, 2000. The newspaper operation consists of the Freeman, with daily circulation of 16,319; the Sunday Post, a shopper publication that supplements the daily Freeman; House & Home, a real estate publication distributed in the Freeman; and Time Out, an entertainment publication distributed in the Freeman.

In addition, Dirks, Van Essen & Murray was asked to determine the fair-market value of the Waukesha County Freeman and related publications as of September 30, 2000 assuming that the circulation of the daily newspaper were 21,194.

The fair-market value is considered to represent a value at which a willing seller and a willing buyer, both being informed about the relevant facts about the business, could reasonably complete a transaction, with neither party acting under compulsion to do so.

3. QUALIFICATIONS OF THE APPRAISERS

Established in 1980, Dirks, Van Essen & Murray is the leading mergers-and-acquisitions firm in the newspaper industry. Over the past five years, the firm has handled the sale of more than 225 daily newspapers with aggregate deal value of nearly $6.0 billion. In addition, the firm has performed hundreds of appraisals of newspapers since the firm was founded.

The principal appraiser, Philip W. Murray, has spent his entire professional career in the newspaper industry, including the last five with Dirks, Van Essen & Murray. In his current position as senior vice president, Murray manages the sales of daily and weekly newspapers and performs valuations for a variety of purposes.

Murray spent 11 years as a reporter and editor at daily newspapers in Virginia and Pennsylvania after graduating Phi Beta Kappa from Washington and Lee University in 1983. In May 1996 he earned a master's degree in business administration from the University of Virginia's Darden School, graduating as one of the top 10 students in the class, and joined Dirks, Van Essen & Associates. A copy of his vita appears in Appendix C.

4. VALUATION APPROACH AND ANALYSIS

The discounted cash flow approach recognizes that the value of a business is dependent on the future earnings that will accrue to the owner of the business. This approach discounts the future benefits (cash flow) to reflect the time value of money in the context of financial risk associated with the investment.

Since the value of an enterprise is based upon the future cash flows that accrue to the owner, certain assumptions must be made to estimate future earnings. The model begins with a baseline income statement that is based on the newspaper's recent performance. The valuation excludes outside commercial printing revenue and earnings. Certain adjustments were made to the company's financial statements to reflect, in our opinion, the true operating performance of the Freeman and its related products. These adjustments and assumptions going forward are detailed below.

Adjustments

Corporate Expenses. The company's corporate expenses are charged back to the individual operating units using an allocation based on revenue. The corporate staff oversees the operations of a number of newspapers in addition to the Freeman, but does not provide any direct operating services. The Freeman performs all of its billing and other financial services locally and has adequate staff to operate independently of the corporate office. For this reason, we have removed the corporate expenses from this analysis.

News-Editorial Expenses. The Freeman's editorial staff provides certain services to other newspapers owned by the company. These include management of all of the company's new media operations and news editing services. Management estimates that these services provided to other newspapers increase the Freeman's editorial expenses by approximately $150,000 annually. Therefore, we have reduced editorial expenses by $150,000 in the historical financials.

Assumptions

Baseline Year. We examined income statements for the Freeman, Sunday Post, House & Home, and Time Out for the calendar year 1999 and year-to-date 2000 through September 30. Advertising sales softened somewhat during 2000 as the newspaper struggled with excessive turnover on the sales staff. The newspaper now has a full complement of trained sales personnel on staff, and management believes revenue will now return to previous levels.

Nevertheless, since the performance of the newspaper has suffered somewhat in 2000, we took an average of the 1999 results and the trailing 12 months results ended September 2000 to establish the baseline year. This reflects a conservative approach to the valuation even though management expects to finish the year with stronger numbers. The calculation of the baseline year is shown in Table 1. This baseline year was used as the starting point for projecting future cash flows of the Freeman with its current circulation of 16,319.

Adjusted Baseline Year. To calculate the value of the Freeman with a circulation of 21,194, certain adjustments were made to the newspaper's current revenue and expense levels. These are shown in Table 2. The average rate charged for retail advertising in the Freeman in 2000 was $11.64 per inch. At the Freeman's current circulation of 16,319, this represents to the advertiser a cost of 71 cents per inch per thousand circulation. Cost per thousand (CPM) is a common gauge used by advertisers to assess the cost of the advertisement.

Assuming that the Freeman would be able to charge the same CPM rate at the higher circulation level of 21,194, the newspaper's average retail rate would be $15.05. This calculation is shown below. Similar adjustments would be made to the average rates for classified, legal, and preprint advertising to yield the total annual ad revenue show below.

Rate Adjustment	CPM	Average Retail Rate	Annual Ad Revenue (Total)
Freeman with 16,319 Circulation	$0.71	$11.64	$4,720,676
Freeman with 21,194 Circulation	$0.71	$15.05	$6,130,890

A newspaper with steady to slightly declining circulation typically would raise its advertising rates annually by rates slightly in excess of the inflation rate. This tends to increase the CPM over time. The Freeman has been unable to make aggressive adjustments to its rates in recent years as circulation has declined. Instead the CPM has risen by holding the line on rates as circulation has fallen. Since advertisers measure their advertising cost by CPM, the Freeman's current CPM reflects what the market will bear. Therefore, it is reasonable to assume that advertisers would be willing to pay higher average inch rates if the Freeman had a circulation of 21,194 as long as their cost per thousand circulation remained constant. Over time the Freeman's advertising revenue would have risen with the annual rate increases.

The Inland Press Association's annual cost and revenue survey further substantiates the premise that the Freeman's advertising revenue would be higher if its circulation were higher. This survey covers newspapers nationwide with a particular concentration of those in the Midwest. Table 3 shows the relationship between circulation and advertising revenue for daily newspapers with circulation up to 30,000, according to the Inland survey. According to the survey, newspapers with average circulation of 16,250 generated $6.3 million in total newspaper revenue in 1999. This compares with $6.4 million for the Freeman in the baseline model. Newspapers with average circulation of 20,600 generated $8.7 million in total newspaper revenue in 1999. This compares with $8.3 million for the Freeman in the adjusted baseline model.

Higher circulation has a more direct impact on circulation revenue. At 21,194, the circulation would be approximately 29.9 percent higher than it is today. Using the assumption that the mix of subscriptions and single copy sales would be the same at the higher circulation level, circulation revenue has been increased by 29.9 percent. Again, this relationship is substantiated by the Inland averages shown in Table 3.

The other revenue category is not affected by circulation. Therefore, no adjustment has been made to this category.

Expense categories also were adjusted upward to reflect costs associated with operating a larger newspaper. With exception of two categories -- production and news-editorial -- all of the expense lines were increased by 29.9 percent, which correlates to the percentage increase in circulation. In the production area, all expenses other than labor (primarily newsprint and ink) were increased by 29.9 percent. Labor was increased at a lower rate since the press time to run another 5,000 copies per day is minimal. News-editorial expenses also were increased at a lower percentage since the basic local coverage of the newspaper would not change at the higher circulation level.

Annual Growth Rate in Advertising Revenue. Nationwide, newspapers are the leading advertising medium and have maintained a consistent market share of total advertising in all media in recent years. Although newspapers have lost market share over the past several decades to other media, they still hold the top position. In 1999, newspapers captured 21.5 percent of the nation's $215.3 billion in ad spending, according to the Newspaper Association of America. In 1998, newspapers captured 21.8 percent of total ad spending. In 1960, newspapers' market share stood at 30.8 percent.

At the same time, however, the newspaper industry has enjoyed solid annual increases in advertising revenue in recent years as the U.S. economy has grown. In 1999 total ad spending in newspapers nationwide grew from $43.9 billion to $46.3 billion, according to the NAA, an increase of 5.4 percent. Table 4 shows total advertising revenue in U.S. newspapers from 1990 to 1999, which includes the recession years of the early 1990s. The average annual growth rate of ad revenue for these years was 4.1 percent.

Advertising in a community newspaper is largely local in nature. To a large extent, therefore, the ability of a local newspaper to generate annual increases in ad spending correlates closely with growth in the local market. Since local retailers represent the largest portion of ad spending in a community newspaper, retail sales growth is a good indicator of advertising revenue growth in the newspaper.

Retail sales in the primary market for the Freeman, Waukesha County, Wisconsin, are projected to grow from $5.4 billion to $7.3 billion over the next five years, an increase of 33.1 percent, according to Claritas/Market Statistics. This represents a compound annual growth rate (CAGR) of 5.88 percent. The projected retail sales growth rate in Waukesha County is better than that projected for the U.S. as a whole, which is 30.2 percent over the same period or 5.42 percent per year.

Therefore, to project an annual growth rate for advertising in the Freeman going forward, we used the national average over the past decade, 4.1 percent, and adjusted it upward by 40 basis points to reflect the better-than-average projected growth rate in retail sales for Waukesha County. This annual growth rate of 4.5 percent assumes that the circulation of the Freeman stabilizes at 16,319 and 21,194 respectively, which would allow for the normal annual increases in ad rates. Under the assumption that circulation stabilizes, advertising revenue performance in the recent past at the Freeman (with declining circulation) does not provide a good indicator of future growth trends.

Annual Growth Rate in Circulation Revenue. The model assumes that the circulation of the Freeman going forward would follow the national trends, which show circulation at flat to slightly declining levels. Therefore, the Freeman's recent history with significantly declining circulation does not provide a good indicator of future growth trends.

Growth in circulation revenue at the national level has been less robust in recent years than that experienced by newspapers in advertising revenue. Between 1991 and 1999, total circulation revenue at U.S. newspapers increased from $8.7 billion to $10.5 billion, representing a compound annual growth rate of 2.3 percent. This trend is shown in Table 5. The models, therefore, use the national average over the past decade to project annual growth in circulation revenue for the Freeman in the future.

Annual Growth Rate in Other Revenue. The other revenue category represents small, miscellaneous sources of revenue to the Freeman. The models assume modest annual increases of 2 percent in this category.

Terminal Value. The terminal value assigns a value to the ongoing business beyond the 10 years projected in the models. The models assume an exit multiple of 10 times EBITDA in Year 10. This multiple is consistent with prices being paid for suburban daily newspapers in today's private market. Moreover, it is consistent with the values placed on both the Freeman with circulation of 16,319 and with circulation of 21,194.

Capital Expenditures. The single largest capital investment for most daily newspapers is the press. These presses, when well-maintained, have useful lives that are decades-long. Management believes the Freeman's press is in good condition and does not need to be replaced in the near-term or medium-term. Ongoing capital investments for newspapers consist primarily of replacement computers and other relatively inexpensive equipment. The models, therefore, project annual capital expenditures at the Freeman at a rate of 2 percent of total revenue each year. Based on our experience, this amount is consistent with the level of capital expenditures at community newspapers around the country.

EBITDA Margin. The Freeman's EBITDA in 1999, after the two adjustments described above, represented 12.0 percent of total revenue. For the trailing 12 months ended September 30, 2000, the EBITDA margin was 10.8 percent. To project a margin for the newspaper with circulation of 16,319 in future years, therefore, we took an average of these two numbers. The model makes a conservative assumption that the margin will remain constant in future years despite higher revenue.

The model for the Freeman with circulation of 21,194 assumes a slightly higher EBITDA margin of 13.0 percent. This assumption is based on the premise that not all expenses would vary with higher revenue. In other words, the increased revenue from the higher circulation level would fall incrementally to the bottom line at a higher rate. For example, labor expenses in the

press room would not change materially at the higher circulation level since the press can produce an additional 5,000 copies of the Freeman in a short time. Similarly news-editorial expenses would not change incrementally as much as some other expense categories.

This notion that higher circulation newspapers operate at higher margins is borne out by the annual survey conducted by the Inland Press Association. Table 6 shows the average operating margin by circulation groups, according to the Inland study. As the table shows, operating margin increases as circulation increases up to circulation of 30,000, when it begins to level off. The margin increases by four to five percentage points moving from group to group. Therefore, the increased EBITDA margin from 11.4 percent to 13.0 percent at the Freeman represents a conservative assumption, given the Inland data.

Discount Rate. The discount rate is used to determine the present value of the future cash flows of the business. The discount rate used in both models is based on the Weighted Average Cost of Capital formula using data from nine publicly traded newspaper companies. The formula uses only those companies that have derived at least 50 percent of their revenue and earnings from newspapers for each of at least the past three years. Certain other publicly traded newspaper companies were excluded from the list for various reasons. Dow Jones, for example, was excluded since it derives the bulk of its newspaper revenue from a single, national financial newspaper and is not representative of community newspapers.

The WACC calculation, detailed in Appendix A, shows that newspapers are relatively low-risk investments, since the Betas of all but one of these publicly traded companies are less than 1. This tends to lower the cost of capital for newspaper companies, which has the effect of increasing the present value of future cash flows.

The WACC calculation as of September 30, 2000 is 9.47 percent. However, these publicly traded newspaper companies are much larger than the Freeman and more geographically diverse. Therefore, the discount rate used in the models to value the Freeman has been adjusted

upward to 11.0 percent to reflect the increased risk inherent in a single community newspaper serving one market.

Discounted Cash Flow Calculations

Based on the assumptions described above, two models were constructed to value the Freeman with its current circulation of 16,319 and a pro forma Freeman with circulation of 21,194. These two models are shown in Tables 7 and 8.

The first model produces an entity value of $7,645,238 for the Freeman as of September 30, 2000. The second model produces an entity value of $11,498,305 for the pro forma Freeman with circulation of 21,194.

Submitted by

Philip W. Murray
Senior Vice President
Dirks, Van Essen & Murray

12-1-00
Date

CONFIDENTIAL

APPENDIX A:

TABLES

Waukesha County (WI) Freeman And Related Publications

Statements of Income

	Calendar Year 1999	Trailing 12 Months*	Baseline Year
Revenue			
Advertising	$4,857,134	$4,584,217	$4,720,676
Circulation	1,635,529	1,615,232	1,625,381
Other	43,460	81,777	62,619
Total Revenue	6,536,123	6,281,226	6,408,675
Expenses			
News-Editorial	1,214,028	1,140,473	1,177,251
Composition	257,215	230,341	243,778
Production	1,624,307	1,597,790	1,611,049
Distribution	862,915	862,793	862,854
Advertising	815,585	820,060	817,823
Circulation Sales	372,326	455,902	414,114
Building	184,468	168,645	176,557
Adminstration	568,847	474,938	521,893
Corporate	365,440	474,401	419,921
	6,265,131	6,225,343	6,245,237
EBITDA	270,992	55,883	163,438
Adjustments:			
Corporate	365,440	474,401	419,921
Editorial	150,000	150,000	150,000
Adjusted EBITDA	786,432	680,284	733,358
Margin	12.0%	10.8%	11.4%

*Ended September 30, 2000

Note: Baseline year represents an average of calendar 1999 and trailing 12 months.

Table 2

Waukesha County (WI) Freeman And Related Publications

Statements of Income

	Baseline Year	Adjusted Baseline Year
Revenue		
Advertising	$4,720,676	$6,130,890
Circulation	1,625,381	2,110,933
Other	62,619	62,619
Total Revenue	6,408,675	8,304,442
Expenses		
News-Editorial	1,177,251	1,386,231
Composition	243,778	316,602
Production	1,611,049	2,044,363
Distribution	862,854	1,120,616
Advertising	817,823	1,062,132
Circulation Sales	414,114	537,823
Building	176,557	229,299
Adminstration	521,893	677,798
Corporate	419,921	419,921
	6,245,237	7,794,785
EBITDA	163,438	509,657
Adjustments:		
Corporate	419,921	419,921
Editorial	150,000	150,000
Adjusted EBITDA	733,358	1,079,577
Margin	11.4%	13.0%

Note: Baseline year represents an average of calendar 1999 and trailing 12 months.

Table 3

Inland Press Association
National Cost and Revenue Study
Based on 1999 Newspaper Results

Group	Circulation Average	Revenue Averages			
		Advertising	Circulation	Other	Total
1	2,750	$809,300	$268,600	$15,900	$1,093,800
2	5,050	1,001,800	359,100	20,700	1,381,600
3	6,000	1,350,200	395,400	9,300	1,754,900
4	7,100	1,551,800	583,700	8,700	2,144,200
5	8,300	1,718,600	621,500	19,200	2,359,300
6	9,500	1,993,700	829,500	26,200	2,849,400
7	10,650	2,512,600	858,600	22,900	3,394,100
8	11,500	3,077,400	1,027,100	41,500	4,146,000
9	12,400	2,630,700	1,118,300	69,500	3,818,500
10	13,600	3,650,900	1,221,800	67,000	4,939,700
11	14,900	3,672,000	1,368,300	36,000	5,076,300
12	16,250	4,804,200	1,475,700	41,200	6,321,100
13	17,850	5,397,100	1,577,200	36,500	7,010,800
14	19,350	5,270,400	1,709,000	69,700	7,049,100
15	20,600	6,851,000	1,771,900	70,800	8,693,700
16	21,900	7,412,500	2,538,600	33,500	9,984,600
17	23,400	6,972,400	2,522,100	93,900	9,588,400
18	25,350	8,985,500	2,835,100	164,700	11,985,300
19	27,750	9,921,300	3,397,100	120,900	13,439,300
20	29,900	11,438,000	3,222,400	106,700	14,767,100

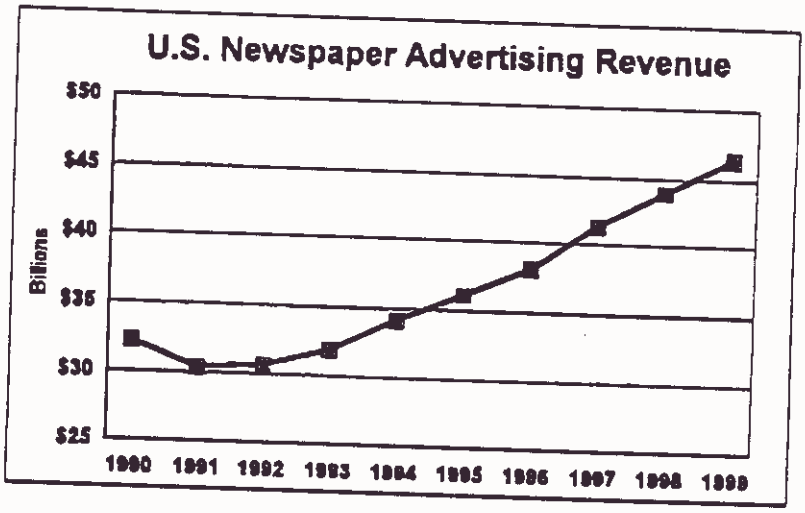
Source: Inland Press Association

Note: Groups that correlate to the two Freeman models shown in boxes.

Table 4

U.S. Daily Newspapers
Total Advertising Revenue by Year

	Total ($000,000)	% Change
1990	32,280	
1991	30,349	-6.0%
1992	30,639	1.0%
1993	31,869	4.0%
1994	34,109	7.0%
1995	36,092	5.8%
1996	38,075	5.5%
1997	41,330	8.5%
1998	43,925	6.3%
1999	46,289	5.4%
CAGR		4.1%

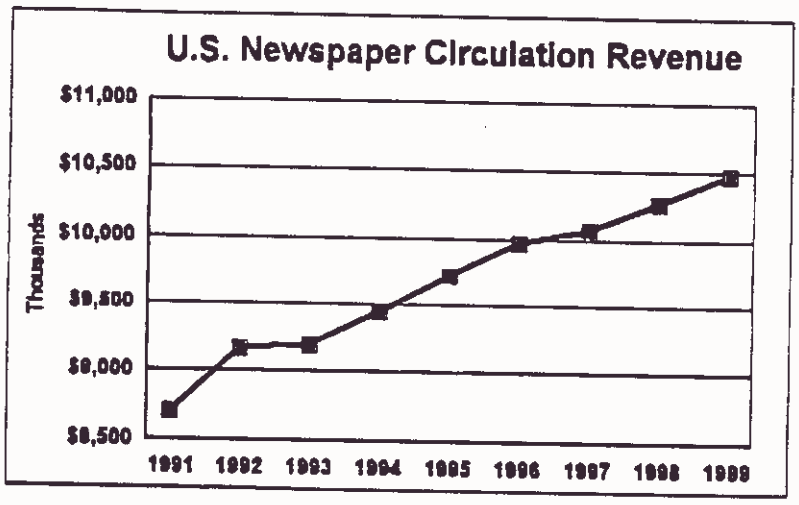


Source: NAA

Table 5

U.S. Daily Newspapers
Total Circulation Revenue by Year

	Total ($000)	% Change
1991	8,697,679	
1992	9,163,534	5.4%
1993	9,193,802	0.3%
1994	9,443,217	2.7%
1995	9,720,186	2.9%
1996	9,969,239	2.6%
1997	10,065,643	1.0%
1998	10,266,955	2.0%
1999	10,472,294	2.0%
CAGR		2.3%



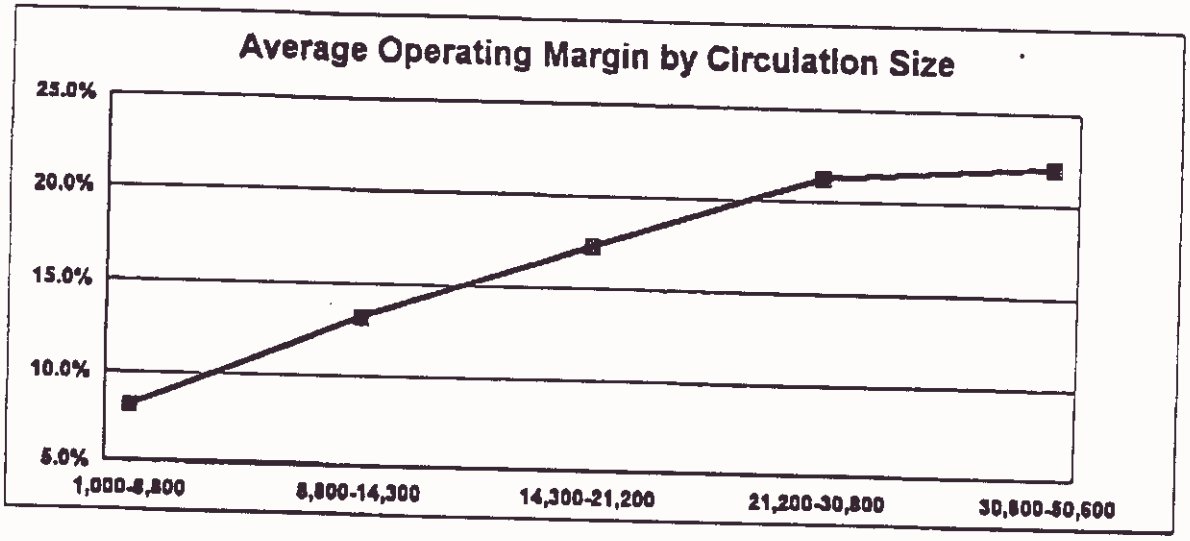
Source: NAA

Table 6

Inland Press Association
National Cost and Revenue Study
Based on 1999 Daily Newspaper Results

Circulation Group	Average Operating Margin*
1,000-8,800	8.1%
8,800-14,300	13.2%
14,300-21,200	17.3%
21,200-30,800	21.2%
30,800-50,600	22.0%

*Newspaper operations only. Commercial printing and other revenue sources excluded.



Source: Inland Press Association

Table 7

Waukesha County (WI) Freeman And Related Publications

Discounted Cash Flow Analysis
Daily Circulation 16,319

Assumptions

Annual Growth Rates	
Advertising	4.5%
Circulation	2.3%
Other	2.0%
Terminal Value	10 x
CapEx	3.0%
Discount Rate	11.0%
EBITDA Margin	11.4%

	Baseline	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
Revenue											
Advertising	$4,720,676	4,933,106	5,155,096	5,387,075	5,629,493	5,882,821	6,147,547	6,424,187	6,713,276	7,015,373	7,331,065
Circulation	1,625,381	1,662,764	1,701,008	1,740,131	1,780,154	1,821,098	1,862,983	1,905,831	1,949,666	1,994,508	2,040,382
Other	62,619	63,871	65,148	66,451	67,780	69,136	70,519	71,929	73,368	74,835	76,332
Total Revenue	6,408,675	6,659,741	6,921,252	7,193,657	7,477,428	7,773,054	8,081,049	8,401,947	8,736,309	9,084,716	9,447,778
Operating Expenses	5,675,317	5,897,653	6,129,238	6,370,472	6,621,770	6,883,567	7,156,318	7,440,495	7,736,595	8,045,133	8,366,649
EBITDA	733,358	762,088	792,013	823,185	855,658	889,487	924,731	961,452	999,714	1,039,583	1,081,129
Margin	11.4%	11.4%	11.4%	11.4%	11.4%	11.4%	11.4%	11.4%	11.4%	11.4%	11.4%
Capex		199,792	207,638	215,810	224,323	233,192	242,431	252,058	262,089	272,541	283,433
Terminal Value											10,811,289
Cash Flow		562,296	584,376	607,375	631,335	656,295	682,300	709,394	737,625	767,042	11,608,985

Entity Value	$7,645,238

Table 8

Waukesha County (WI) Freeman And Related Publications

Discounted Cash Flow Analysis
Daily Circulation 21,194

Assumptions

Annual Growth Rates	
Advertising	4.5%
Circulation	2.3%
Other	2.0%
Terminal Value	10 x
CapEx	3.0%
Discount Rate	11.0%
EBITDA Margin	13.0%

	Adjusted Baseline	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Year 8	Year 9	Year 10
Revenue											
Advertising	$6,130,890	$6,406,780	$6,695,085	$6,996,364	$7,311,201	$7,640,205	$7,984,014	$8,343,294	$8,718,743	$9,111,086	$9,521,085
Circulation	2,110,933	2,159,484	2,209,153	2,259,963	2,311,942	2,365,117	2,419,515	2,475,163	2,532,092	2,590,330	2,649,908
Other	62,619	63,871	65,149	66,452	67,781	69,136	70,519	71,930	73,368	74,836	76,332
Total Revenue	8,304,442	8,630,136	8,969,387	9,322,779	9,690,924	10,074,458	10,474,047	10,890,387	11,324,203	11,776,252	12,247,325
Operating Expenses	7,224,865	7,508,218	7,803,366	8,110,818	8,431,103	8,764,778	9,112,421	9,474,637	9,852,057	10,245,339	10,655,173
EBITDA	1,079,577	1,121,918	1,166,020	1,211,961	1,259,820	1,309,680	1,361,626	1,415,750	1,472,146	1,530,913	1,592,152
Margin	13.0%	13.0%	13.0%	13.0%	13.0%	13.0%	13.0%	13.0%	13.0%	13.0%	13.0%
apex		258,904	269,082	279,683	290,728	302,234	314,221	326,712	339,726	353,288	367,420
rminal Value											15,921,522
sh Flow		863,014	896,939	932,278	969,092	1,007,446	1,047,405	1,089,039	1,132,420	1,177,625	17,146,255
y Value	$11,498,305										

APPENDIX B: WEIGHTED AVERAGE COST OF CAPITAL

The cost of capital, used to discount future cash flows to a present value, measures the tradeoff between risk and return in an investment. The higher the risk, the higher the return demanded by investors. The cost of capital, therefore, rises as the risk increases.

In order to derive an appropriate cost of capital for the Waukesha County Freeman, we have used data from publicly traded newspaper companies. The price movements of the stock of public newspaper companies provide an opportunity to quantify the risk that the investment community places on newspaper companies relative to the stock market as a whole. While the comparison is not perfect, the average public newspaper company cost of capital offers a good benchmark for determining an appropriate discount rate for this analysis. The calculations are shown in Tables 9 and 10 following the text in this appendix.

The cost of capital has two components: the cost of debt and the cost of equity. The cost of debt is simply the interest rate on leverage for the acquiring company. A number of factors can affect that rate, including the amount of leverage in the transaction and the risk of the investment. However, for the purposes of this exercise, that rate has been estimated at the prime rate plus 200 basis points, or 9.50 percent, as of September 29, 2000.

The cost of equity attempts to capture the rate of return that equity investors would demand. To estimate the cost of equity for public newspaper companies we have used the capital asset pricing model (CAPM). The model has two components -- the rate of return on a risk-free investment plus an equity risk premium based on the riskiness of the investment. The risk-free rate is simply the yield on a 30-year Treasury bond on September 29, 2000 -- 5.88 percent. The assumption made here is that the investment under consideration is a long-term one.

The second component of CAPM begins with the rate of return that stocks historically have provided to investors in excess of the risk-free rate. That number, over the long term, is 5.4 percent. To adjust the equity risk premium to account for the risk associated with newspaper companies specifically, we have used the so-called "Beta" numbers for nine stocks that were

judged to be the best comparables for the Freeman newspaper -- Belo, Gannett, Journal Register Co., Knight Ridder, Lee Enterprises, McClatchy Newspapers, Media General, New York Times, and E.W. Scripps. At each of those companies, at least 50 percent of sales and earnings are derived from newspaper publishing in each of the last three years.

Beta measures the movement of a company's stock relative to the market as a whole. The market is assigned a value of 1. Stocks that are less volatile than the market -- and thus less risky -- will have Betas that are less than 1; more volatile stocks will have Betas greater than 1. Table 9 shows that the average Beta for the nine newspaper stocks is .823, making newspaper companies less risky than the market overall.

Multiplying the historical equity risk premium of 5.4 percent by the average Beta for newspaper stocks of .823 yields an equity risk premium for newspaper stocks of 4.44 percent. That number, when added to the risk-free rate, yields an average cost of equity for the nine newspaper company stocks of 10.33 percent.

The final step in calculating a cost of capital is to weight the cost of debt and cost of equity based on an assumed capital structure. Again using the nine newspaper companies as a guide, Table 10 shows that the average capital structure of those companies is 75.2 percent equity and 24.8 percent debt. Finally, since interest on debt is tax deductible, some provision has to be made in the formula for the tax effects of leverage. Using the average marginal tax rate of the nine public newspaper companies of 40.3 percent, the formula for the weighted average cost of capital is:

((Cost of Debt * % of Debt) * (1 - Marginal Tax Rate)) + (Cost of Equity * % of Equity)

The calculation for public newspaper companies yields a weighted average cost of capital of 9.47 percent.

To estimate an appropriate discount rate for the Freeman, a number of qualitative factors have to be taken into account. The Freeman is a much smaller operation than the public newspaper companies, and it is dependent on the fortunes of a single region. For the public companies the risk is spread over many different markets.

For that reason, we have chosen a discount rate of 11 percent for this analysis. That number, we believe, accommodates the additional risk associated with the dependence on a single market.

Table 9

Cost of Equity

Formula: Long-term risk-free rate + (Beta*equity risk premium)

Risk Free Rate	5.88%	(30-year Treasury as of September 29, 2000)
Equity Risk Premium	5.40%	(Historical difference between long-term equity risk and risk-free rates)

	Beta	Cost of Equity
Belo	0.90	10.74%
Gannett	0.87	10.58%
Journal Register Co.	0.79	10.15%
Knight Ridder	0.82	10.31%
Lee Enterprises	1.08	11.72%
McClatchy Newspapers	0.69	9.61%
Media General	0.72	9.77%
New York Times	0.77	10.04%
E. W. Scripps	0.77	10.04%
Average	0.823	10.33%

Cost of Debt

Tax Rates	
Belo	35.5%
Gannett	39.8%
Journal Register Co.	39.8%
Knight Ridder	40.2%
Lee Enterprises	36.2%
McClatchy Newspapers	48.5%
Media General	39.4%
New York Times	42.4%
E. W. Scripps	40.7%
Average	40.3%

Interest Rates	
Prime Rate (09/29/00)	9.50%
Estimated Lending Rate	11.50%

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Table 10

Capital Structure

	Share Price 09/29/2000	Shares Outstanding (000)	Mkt Value Equity (000)	% Equity	Mkt Value Debt (000)	% Debt
Belo	$18.437	119,177	$2,197,266	54.3%	$1,849,490	45.7%
Gannett	53.000	281,608	14,925,224	71.2%	6,038,000	28.8%
Journal Register Co.	16.625	46,873	779,264	45.9%	919,000	54.1%
Knight Ridder	50.812	97,460	4,952,138	79.7%	1,261,000	20.3%
Lee Enterprises	28.875	44,273	1,278,383	87.2%	187,005	12.8%
McClatchy Newspapers	35.187	45,015	1,583,943	64.3%	878,166	35.7%
Media General	43.000	26,885	1,156,055	96.0%	48,557	4.0%
New York Times	39.312	179,244	7,046,440	93.2%	512,627	6.8%
E. W. Scripps	54.000	78,142	4,219,668	84.7%	761,300	15.3%
Average				75.2%		24.8%

Note: Shares are fully diluted.

Weighted Average Cost of Capital

Formula: ((Cost of Debt * % Debt)*(1-Marginal Tax Rate))+(Cost of Equity * % Equity)

Weighted Average Cost of Capital	9.47%

APPENDIX C: VITA OF APPRAISER

Philip Wilhelm Murray
119 East Marcy Street, Suite 100
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EXPERIENCE

1996-Present	**Dirks, Van Essen & Murray** *Senior Vice President* Manage sale process of daily and weekly newspapers; conduct valuations of newspaper properties; advise clients on merger and acquisition opportunities.	Santa Fe, NM
Summer 1995	**Nando.net**, *Content Development Manager*	Raleigh, NC
1992-1994	**The Virginian-Pilot**, *Business Reporter*	Norfolk, VA
1991-1992	*Freelance Writer*	Bangkok, Thailand
1990-1991	**Butler Eagle**, *City Editor*	Butler, PA
1988-1990	**The Richmond News Leader**, *City Hall Reporter*	Richmond, VA
1983-1988	**Daily Press**, *City Hall and Business Reporter*	Newport News, VA

EDUCATION

Darden Graduate School of Business Administration — Charlottesville, VA
University of Virginia
Masters in Business Administration, May 1996
- William Michael Shermet Award, given to the top 10 students in each class
- Batten Fellowship, full-merit scholarship for working journalists
- Business Manager, *Darden News*

Washington and Lee University — Lexington, VA
Bachelor of Arts, Journalism, 1983, Magna Cum Laude
- Phi Beta Kappa
- Sigma Delta Chi Outstanding Graduate in Journalism
- Editor-in-chief, student yearbook; editor/writer, student newspaper

SUPREME COURT OF WISCONSIN

Appeal No. 01-3128

CONLEY PUBLISHING GROUP, LTD.,
FREEMAN NEWSPAPERS LLC and
LAKESHORE NEWSPAPERS, INC.,

Plaintiffs-Appellants,

v.

JOURNAL COMMUNICATIONS, INC. and
JOURNAL SENTINEL, INC.,

Defendants-Respondents.

On Appeal from the Circuit Court for Waukesha County, the Hon. Donald Hassin, Presiding
Case No. 00-CV-222

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A-Ap.__	Page in Appendix of Plaintiffs-Appellants Conley Publishing Group Ltd., *et al.* (*Waukesha Freeman*).
Br.	Brief and Appendix of Plaintiffs-Appellants
R.__	Document in Record on Appeal

Statement of Issue

Did antitrust plaintiffs' expert reports that failed to address elements of predatory pricing claims, causation, and damages that are required elements of a *prima facie* case as a matter of law create questions of fact sufficient to avoid summary judgment on plaintiff's predatory pricing antitrust claim?

Trial Court Answer: No.

Appellate review of the summary judgment decision below is *de novo*. This court is to apply the same methodology used by the trial court. *Henry ex rel. Weis v. General Cas. Co.*, 225 Wis. 2d 849, 856, 593 N.W.2d 913, 916 (Ct. App. 1999).

Introduction

The *Waukesha Freeman* accuses the *Milwaukee Journal Sentinel*'s publishers of "predatory pricing" – an antitrust theory that is rarely invoked and less rarely successful.[1] Contrary to the purpose of the antitrust laws, ill-founded allegations of predatory pricing stifle competition.[2] For good reason, courts at all levels have all but abandoned this theory, finding that allegedly "predatory" prices almost always are actually low prices that serve primarily to benefit consumers.[3]

In bringing this action, *Freeman* publisher Conley is seeking not lawful competition, but *protection* from competition. Conley wants protection for the *Freeman*'s own admitted failures in meeting the needs of the marketplace.

The *Freeman* complains that the trial court "rejected" its expert reports as "unpersuasive." (*See* Br.15.) But in fact, Judge Hassin accepted in full the expert evidence proffered by the *Freeman* and correctly concluded, as a matter of law, that it failed to address the material elements of the Conley claims.

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1 *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) ("predatory pricing schemes are rarely tried, and even more rarely successful").

2 *Matsushita*, 475 U.S. at 594 (mistaken inferences of predatory pricing are especially costly because they chill the very conduct that antitrust laws are designed to protect).

3 *See, e.g., A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989) (prices less than cost today, followed by competitive prices tomorrow, bestow a gift on consumers).

Suspect from the start, claims of predatory pricing should be dismissed on summary judgment if not properly supported. Nothing suggests Wisconsin should become a unique haven for such claims by taking a less critical approach. Judge Hassin applied the law correctly, and his decision should be affirmed.

Statement of the Case and Statement of Facts

On summary judgment, Judge Hassin dismissed all five causes of action in Conley's operative Second Amended Complaint. (A-Ap.116.) On appeal, Conley pursued only the predatory pricing claim. The following facts are not disputed.

A. The newspapers

The *Milwaukee Journal Sentinel* is a morning newspaper. It is published seven days a week by defendant-respondent Journal Sentinel Inc., a wholly owned subsidiary of defendant-respondent Journal Communications Inc. (R.17: Hoffman ¶2.) As of September 2000, the *Journal Sentinel*'s daily circulation was 278,377 and its Sunday circulation was 461,025. (*Id.* ¶4.)

The *Waukesha Freeman* is principally an afternoon newspaper. It is published Monday through Friday afternoons and on Saturday mornings by plaintiff-appellant Freeman Newspapers LLC, which is owned by plaintiff-appellant Conley Publishing Group, Ltd. (R.6: ¶1.) As of September 2000, the *Freeman*'s circulation was 15,991. (R.17: Hoffman ¶5.)

The *Freeman*'s circulation has been declining since 1993 after having been relatively steady at about 22,500 since 1987. (R.17: Ex. 147.)

B. The correlation between circulation and advertising

Maintaining circulation is important to newspapers. Circulation supports a newspaper's advertising sales, with higher daily circulation generally resulting in higher daily advertising revenues. (R.17: Baseman ¶66, Kackley ¶3, Hoffman ¶7.) In the case of the *Journal Sentinel*, each new daily subscriber is worth about $200 annually in additional advertising revenue. (R.17: Baseman ¶68.)

The *Freeman*'s experts repeatedly acknowledged this economic fact of the newspaper business. "[O]ne of the reasons a newspaper wants to maintain or increase its circulation is to maintain or increase its advertising revenue." (*See* R.17: Gollop Dep. 50:10-21.) *See also* A-Ap.142 (Gollop Report): "[N]ewspaper circulation and advertising sales are highly correlated..."; A-Ap.150 (Gollop Report): "Advertisers become more willing to pay higher advertising rates to a newspaper as the paper's circulation increases," *and* A-Ap.165 (Degen Report): "Advertising revenue is partially determined by subscriptions." Indeed, the *Freeman*'s damages expert claimed he could calculate to the dollar the loss in advertising revenue attributed solely to the *Freeman*'s declining circulation. *Id.* at A-Ap.167.

Because of turnover among newspaper subscribers, the *Journal Sentinel* has found that constant sales effort is needed just to try to maintain circulation levels. (R.17: Hoffman ¶6.) Discounted subscription offers play an important role in newspaper marketing by increasing reported circulation and thereby supporting advertising sales. (R.17: Hoffman ¶8, Baseman ¶64, Kackley ¶¶3, 5-7.) Discounted subscriptions also can lead to full-price, long-term renewals. (R.17: Baseman ¶64b, Kackley ¶11.) For

these and other reasons, as the *Freeman*'s own circulation manager recognized, "even though that particular [subscription] order might not be profitable, it's worth getting because of the long-term benefit" to the paper. (R.17: Hohnberger 35:8-18.)

As a tool to build or maintain daily circulation (and therefore advertising revenue), Sunday-daily conversions are a common business practice among newspapers. (R.17: Baseman ¶10a, Kackley ¶¶9-10.) Newspapers use this marketing tool because it is easier and more economical to "convert" an existing Sunday-only subscriber than it is to convince a non-subscriber to begin home delivery, even at discounted rates. (R.17: Kackley ¶¶11-13, Hoffman ¶11.)

The *Journal Sentinel* Sunday-daily conversion programs were structured to provide subscribers with a net discount of no more than 50% off published rates, an industry standard.[4] (R.17: Hoffman ¶¶13, 16.) It is undisputed in the record that the *Journal Sentinel* (and its predecessor *The Milwaukee Journal*) has offered the standard 50%, Sunday-daily conversion to maintain or improve circulation since at least the fall of 1988. (R.17: Pierce ¶¶2-4.)[5]

It is also undisputed that the conversion program has been offered regularly on a rotating basis not just in Waukesha County but *throughout* the four-county metropolitan Milwaukee area (and beyond), through 50,000 or

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[4] The industry's Audit Bureau of Circulation allows full circulation credit for subscriptions sold at 50% or more of full price. (R.17: Hoffman ¶16.)

[5] Conley incorrectly asserts that the Sunday-daily conversion began in 1996. (Br.3, 6.)

more telemarketing calls a year. (R.17: Pierce ¶¶2, 4, Hoffman ¶14, Baseman ¶¶59-61.) This includes those counties (*e.g.,* Milwaukee, Ozaukee and Washington) where Conley claims the *Journal Sentinel* has a monopoly. (Br.3-4.)

The *Freeman* uses discounts as well, offering, for example, 13 weeks at 50% off the newsstand price and a "four-by-four" plan of four weeks' free delivery with a four-week subscription, for a net 50% off the home delivery price. (R.17: Hohnberger 44:22-45:8, 47:8-19, 48:13-22, Exs. 6, 7, 13; 50:4-20, Ex. 18; Stapelfeldt 35:7-9, 36:19-37:5.)

C. Conley's experts' reports

Despite more than a year for fact discovery and the development of expert opinion evidence, Conley was not able to marshal evidence sufficient to satisfy its burden, and Judge Hassin therefore dismissed Conley's entire action on summary judgment.

Conley's antitrust expert, Prof. Frank M. Gollop, had acknowledged the direct correlation between circulation and advertising revenue, but he ignored it in his analysis of the allegedly predatory conversion program. He looked solely at what he considered to be subscription revenue losses. Using as an example the conversion of a 26-week Sunday-only subscriber into a 22-week Sunday-daily subscriber, he compared the total subscription revenue against the added cost of producing the 22 weeks of daily newspapers and opined the *Journal Sentinel* would "lose" $66. (R.17: Gollop Dep. 113:2-115:2.) Doing so, he ignored the impact of advertising revenue attributable to the increase in daily newspaper circulation:

> Q: Did your analysis take into account any increased advertising revenue associated with maintaining or increasing subscriptions?
>
> A: It does only in the following sense. That if each additional conversion program generates a net loss to the *Journal* of $66, I really don't think it was necessary to say that one additional subscription would generate $66 in advertising revenue. If you can show that, that would be terrific. I don't have that kind of data, but I just can't believe one subscription generates $66 in added advertising revenue.
>
> Q: You don't know one way or another?
>
> A: I don't.

(R.17: Gollop 116:24-117:12.)

Had he looked at the data, he would have learned that a daily *Journal Sentinel* subscription generates **$200** in additional yearly advertising revenue. (R.17: Baseman ¶68.) The $200 is undisputed in the record, in part because Prof. Gollop never attempted to generate (or never disclosed, if he did) a comparable figure of his own. Thus, Prof. Gollop concluded the conversion subscriptions were sold at a "loss" only because he ignored a significant – and admitted – source of conversion revenue.

Conley's primary expert on damages was Carl G. Degen. Throughout his calculations, Mr. Degen assumed that 100% of the *Freeman*'s declining market share in Waukesha County – all of it – every last subscriber – was attributable solely to the *Journal Sentinel*'s Sunday-daily conversion program. (A-Ap.164.) It is undisputed, and even admitted by Conley, however, that economic and competitive factors other than the *Journal Sentinel* conversion

program are cause for the *Freeman*'s decade-long decline, as next described.

D. An afternoon newspaper in a morning newspaper world

The *Waukesha Freeman* is an afternoon newspaper in a world that increasingly favors a morning newspaper. (R.17: Kackley ¶¶43-59.) The *Freeman*'s circulation and advertising suffer from this and a host of problems unrelated to the *Journal Sentinel* Sunday-daily conversion program.

Across the nation, afternoon papers have switched to morning – or they have failed. (*Id.*) Afternoon circulation nationwide dropped about 28% between 1995 and 1999, about the same as the actual decline in the *Freeman*'s circulation. (R.17: Baseman ¶71a.) In Waukesha County, the *Freeman* appears to have exhausted its market: of 52,000 adults who prefer an afternoon paper, 48,900 already read the *Freeman*. (R.17: Kackley ¶51.)

The *Freeman* does not offer a Sunday paper. (R.6: ¶1.) Likewise, the *Freeman* has a local, not metropolitan, focus. (R.17: Hovind 27:3-4.) Yet readers and advertisers alike prefer a newspaper with metro-wide coverage. (R.17: Baseman ¶¶15-23 and n.2.) Even Prof. Gollop concedes that "I can't imagine any single advertiser just wanting to reach only the Waukesha readers." (R.31, Gollop 2d 209:11-13.)

Freeman executives admit the paper's own actions harmed circulation. For example, upon buying the *Freeman* in May 1997, "[w]e stopped discounting as much as we had in prior years," leading to a "decline in circulation." (R.31, Doyle 52:3-19.) The *Freeman* also saw circulation

drop after it increased subscription prices in 1999. (R.17: Baseman ¶71b, *see also* Stapelfeldt 64:5-10.)

New or expanded weekly newspapers and shoppers compete with the *Freeman* for advertisers and readers. (R.17: Toske 104:10-18.) The *Freeman* has actually lost advertising revenue to one of its sister publications, *The Waukesha Post*, a free shopper. (R.17: Ciccantelli 76:11-20.)

Freeman publisher Jeffrey Hovind concedes that before 1997, under its prior owners, the *Freeman* was "not very well marketed" and focused its news coverage myopically on the City of Waukesha, not even the whole county. (R.17: Hovind 42:5-8, 36:25-37:4.) Management turnover and other disruptions from the sale also harmed circulation. (R.17: Baseman ¶71d.)

Meanwhile, recognizing the potential for expansion in rapidly growing Waukesha County, the *Journal Sentinel* significantly increased staff and content for the Waukesha zoned pages it publishes each day, making the pages more attractive to readers. (R.17: Baseman ¶71e.)

The *Freeman*'s own research provides the measure of the challenges it faces. When the *Freeman* surveyed Waukesha County residents in 1999, some 62.9% of them said there was "Nothing" that the *Freeman* could do "which would cause [my] household to subscribe." To publisher Hovind, that meant that "in the minds of our non-readers, the *Freeman* has not established itself as a relevant product that they need to have in their homes." (R.17: Hovind 91:5-14.)

Argument

It does not take a Chicago School economist to recognize the inherent implausibility of an antitrust lawsuit that alleges a competitor's prices are "too low." Low prices benefit consumers. They hurt competition only if the discounter can somehow boost future prices high enough to recoup its losses, a risky proposition at best. Reflecting these realities, courts almost always dismiss predatory pricing claims on summary judgment.

To prevail in this case, Conley must show that the trial court was wrong on *each* of the following points:

– By failing to quantify the total "investment" or loss in the supposed predatory pricing scheme, Conley failed to provide the required evidence of a "dangerous probability" of recoupment of that loss, a necessary element of its claim.

– Indeed, by failing to account for advertising revenue associated with circulation, Conley failed to support its allegations that pricing in the *Journal Sentinel* conversion program was predatory in the first place.

– Even assuming, *arguendo*, unlawful conduct by the *Journal Sentinel,* Conley's damages analysis failed to provide any basis – aside from rank speculation – upon which a jury could find causation or award damages.

Conley's attack on the Supreme Court's decision in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), demonstrates the desperation of its legal position. Conley never questioned *Brooke Group* in the trial court. Conley never challenged *Brooke Group* in its initial brief in the Court of Appeals, and in fact it characterized the two elements of the *Brooke Group* test as "per-

fectly logical." (App.Br.16.) Not until its reply brief – when it admitted that if *Brooke Group* controls, "the Freeman has a tough row to hoe" (Reply Br.1) – did Conley change its mind and argue, for the first time, that *Brooke Group* should not be followed in Wisconsin.

For a century, Wisconsin's courts and legislature have relied on the substantial body of federal jurisprudence in interpreting our state's antitrust laws. In fashioning Wisconsin's approach to predatory pricing, this Court should reject Conley's plea to ignore this historic and broad precedent and to adopt instead the isolated and esoteric criticisms of selected academics.

None of the material facts in this case are in dispute. The only question presented is whether Conley and its experts offered sufficient basis to proceed to a jury on the claim asserted. As Judge Hassin found, they did not.

I. Summary judgment is particularly appropriate in predatory pricing cases.

The purpose of summary judgment is "to determine whether there are any disputed factual issues for trial and to avoid trials where there is nothing to try." *Caulfield v. Caulfield*, 183 Wis. 2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994) (internal quotations omitted). To survive a motion for summary judgment, a plaintiff must offer evidence sufficient to prove each essential element of its claim. *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 292, 507 N.W.2d 136, 140 (Ct. App. 1993).

A. Two elements must be satisfied in a predatory pricing action.

The elements of a predatory pricing are clear and show why Conley's case cannot proceed to trial:

"First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that *the prices complained of are below an appropriate measure of its rival's costs.*" *Brooke Group,* 509 U.S. at 222 (emphasis added).

Second, a plaintiff must demonstrate "*a dangerous probability, of [the defendant] recouping its investment in below-cost prices.*" *Id.* at 224 (emphasis added). An "investment" in predatory pricing is not rational unless the predator has "a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." *Id.*

"These prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury." *Id.* at 226.

B. Predatory pricing claims are speculative and implausible, and the standards of proof reflect this.

The United States Supreme Court has recognized the inherently speculative nature of predatory pricing claims:

> A predatory pricing conspiracy is by nature speculative.... [T]he success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition.... "[T]he predator must make a substantial investment with no assurance that it will pay off."

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-89 (1986) (citations omitted).

In *Brooke Group,* the Supreme Court commented further on the "general implausibility of predatory pricing," 509 U.S. at 227, and the corresponding role of summary judgment:

> As we have said in the Sherman Act context, "predatory pricing schemes are rarely tried, and even more rarely successful," *Matsushita, supra*, at 589, and the costs of an erroneous finding of liability are high. "[T]he mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition ... mistaken inferences ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect.' " *Cargill, supra,* at 122, n. 17 (quoting *Matsushita, supra,* at 594.)

Brooke Group, 509 U.S. at 226-27.

The published reports are replete with summary dismissals under *Brooke Group*, many of them cited in the course of this brief.[6] The uniformity of opinion on the appli-

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[6] A non-exhaustive list: *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1256 (11th Cir. 2002) (expert's evidence insufficient, summary judgment affirmed); *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 259 (2d Cir. 2001) (affirming grant of summary judgment); *American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1041-42 (N.D. Cal. 2001) (granting summary judgment); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 536 (5th Cir. 1999) (affirming grant of summary judgment); *Blue Cross & Blue Shield v. Marshfield Clinic*, 152 F.3d 588, 595 (7th Cir. 1998) (affirming grant of summary judgment); *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1192 (3d Cir. 1995) (affirming grant of summary judgment); *A.A. Poultry*, 881 F.2d at 1399, 1404 (affirming judgment notwithstanding the verdict); *Universal Amusements Co. v. General Cin-*

cation of *Brooke Group* is forcefully demonstrated by the fact that Conley finds only a single summary judgment case, from the Minnesota intermediate appellate court, upon which to rely here, *Prestressed Concrete, Inc. v. Bladholm Bros. Culvert Co.*, 498 N.W.2d 274 (Minn. Ct. App. 1993) (Br.17-19). That lone case is not persuasive authority. It was decided in early 1993, before *Brooke Group*. Just as Wisconsin does, Minnesota applies federal law interpretations to its antitrust statutes. *Id.* at 276. With Minnesota courts not reporting a predatory pricing case since *Prestressed,* there is no reason to assume they would not follow *Brooke Group*.

In addition, *Prestressed* is easily distinguishable on its facts. The *Prestressed* plaintiff was able to assert a triable issue of fact because, unlike Conley's Prof. Gollop, the plaintiff's experts actually examined the defendants' financial records and performed a detailed cost accounting on the defendants' "prices as a whole." *Id.* at 278. Prof. Gollop did nothing of the kind, a fatal void in Conley's case.

Conley argues Wisconsin's antitrust statutes provide a greased slide to the jury, because Chapter 133 encourages a "private attorney general" to combat monopolization. (*See* Br.25-26.) But the expressed policy of the Wisconsin legislature is that Chapter 133 be given "the most liberal construction so as to achieve the aim of *competition*." Wis. Stat. §133.01 (emphasis added). As Conley concedes, the aim of the antitrust laws is to protect *competition*, not *competitors*. (Br.13.) Unless dismissed on summary judgment, speculative allegations like Conley's hinder competition

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ema Corp., 635 F. Supp. 1505, 1527 (S.D. Tex. 1985) (granting directed verdict).

and harm consumers by deterring firms from lowering prices as much as possible.

II. Conley failed to present evidence of predatory pricing sufficient to survive summary judgment.

A. Without evidence, Conley's claims could not survive.

Conley sought to prove the elements of predatory pricing through expert opinion evidence. But the opinions of Conley's experts lacked evidentiary support and, as a matter of law, fell far short of a *prima facie* showing. *See Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1198 (3d Cir. 1995) ("expert testimony without such a factual foundation cannot defeat a motion for summary judgment").

Summary dismissal for inadequate expert evidence is not, as Conley argues, a rule confined to federal courts. "When determining whether a trial must be had, the court need only decide whether the party bearing the burden of producing admissible opinion evidence has made a *prima facie* showing that it can do so." *Dean Med. Ctr., S.C. v. Frye*, 149 Wis. 2d 727, 734-35, 439 N.W.2d 633, 636 (Ct. App. 1989) (discussing role of expert testimony on summary judgment).[7]

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[7] *See also Kasbaum v. Lucia*, 127 Wis. 2d 15, 22, 24, 377 N.W.2d 183, 186-87 (Ct. App. 1985) (defendants in medical malpractice case entitled to summary judgment dismissing complaint on defendants' showing that plaintiff had no medical expert to establish his claim); *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 374, 541 N.W.2d 753, 755 (1995) (stating general rule that expert testimony is required for "unusually complex or esoteric issues").

Conley suggests that under Wisconsin's liberal standards for admitting expert testimony, this Court should disregard cases where the federal *Daubert* standard may have played a role. (Br.17-18 and n.87, referring to *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).) However, even Wisconsin's non-*Daubert* approach to expert testimony does not allow a case to proceed where, as here, testimony provides no more than "speculative or conjectural" basis for claims or damages. *See Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 227, 601 N.W.2d 627, 634 (1999).

Although not dispositive or even properly raised in this case, perhaps it is time for Wisconsin to adopt the *Daubert* standard. The Court of Appeals was interested in that question, A-Ap.113, and the federal judiciary has found broad benefit in a standard that requires expert testimony to be "reliable" and not merely "relevant." Regardless of the standard under which the admissibility of expert testimony is determined in Wisconsin, however, the outcome of this case is unaffected. The *admissibility* of Prof. Gollop's and Mr. Degen's evidence was not the issue below, only its *sufficiency* as a matter of law.

B. Conley ignores the legitimate business benefits of the *Journal Sentinel* offer.

The *Journal Sentinel*'s use of the Sunday-daily conversion throughout the entire Milwaukee metropolitan area on a rotating basis since 1988 is undisputed in the record. (R.17: Pierce ¶¶2, 4.) So is the fact that many other newspapers use the same approach for valid business reasons. (R.17: Kackley ¶¶9, 17.) "Business activity is not 'anti-competitive' so long as there is 'a legitimate business justi-

fication for the conduct.'" *United States v. AMR Corp.*, 140 F. Supp. 2d 1141, 1193 (D. Kan. 2001) (dismissing predatory pricing claims against airlines on summary judgment), relying on *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 483 (1992).

Conley's Prof. Gollop conceded this important point. He specifically agreed that increasing or maintaining daily circulation is "a valid business reason" for the *Journal Sentinel* to make the Sunday-daily conversion offer. (R.17: Gollop 103:16-104:7.) This admission alone is sufficient to defeat Conley's claim. Only if challenged conduct "has no rational business purpose other than its adverse effects on competitors, [is] an inference that it is exclusionary ... supported." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000) (quotation omitted).

To survive summary judgment in a predatory pricing case such as this one, "the party with the burden of proof must proffer evidence that tends to preclude an inference of permissible conduct." *Virgin Atl. Airways v. British Airways PLC*, 69 F. Supp. 2d 571, 578 (S.D.N.Y. 1999), *aff'd*, 257 F.3d 256 (2d Cir. 2001) (dismissing predatory pricing claims on summary judgment). Here, the undisputed evidence is to the contrary – the conduct complained of is not only permissible, it is routine.

C. Conley failed to show the "dangerous probability" of recoupment necessary to survive the motion for summary judgment.

Although recoupment is the second essential element of a predatory pricing claim, courts often consider it first, because only if recoupment is feasible need the inquiry proceed to the first element, below-cost pricing. *A.A. Poultry*

Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401 (7th Cir. 1989). To establish this element of its claim, Conley must have proof of a "dangerous probability" that the *Journal Sentinel* will recoup its predation losses by charging monopolistic prices after the *Freeman* is driven from the market. *Brooke Group*, 509 U.S. at 224.

The insurmountable flaw in Conley's case and Prof. Gollop's analysis is his failure to even attempt to identify how much the *Journal Sentinel* supposedly had "invested" or lost in its alleged predatory pricing scheme, or to show how that loss would be recouped. He never quantified a total of the individual "losses" he identified. He never opined or even guessed at how much the *Journal Sentinel* would need to increase subscription rates, or for how long, to recover that sum, or whether the marketplace would tolerate such an increase.

The Supreme Court has anticipated this very case, and has determined the necessary judicial response. "Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market." *Brooke Group*, 509 U.S. at 226. "If market circumstances or *deficiencies in proof* would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, *the plaintiff's case has failed*." *Id.* (emphasis added).

Just this year, the Eleventh Circuit affirmed summary judgment dismissal of a predatory pricing case where the report of the plaintiff's expert was insufficient to show recoupment. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1256 (11th Cir. 2002). The *Bailey* expert (unlike Prof. Gollop)

had actually calculated the dollar amount of the defendant's "investment" in the scheme and had described a specific recoupment scenario. *Id.* But even that was not enough when the expert (like Prof. Gollop) acknowledged competitive realities of the retail propane marketplace that would keep future prices low, but failed to account for them when predicting recoupment would succeed. *Id.*

Conley's sole "evidence" is Prof. Gollop's opinion that recoupment is likely because he says so. (Br.18-19.) That is not enough; his opinion is not supported by any facts or "close analysis." *See Brooke Group,* 509 U.S. at 226. "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." *Id.* at 242.

There were two fundamental voids in Prof. Gollop's recoupment evidence:

1. Prof. Gollop and Conley have no idea how much was supposedly "invested," or how it would be recovered. Prof. Gollop did not calculate or even guess "the amounts expended on the predation, including the time value of the money invested in it." *Id.* at 225. Nor did he attempt to estimate what inflated prices the *Journal Sentinel* would need to charge subscribers to recoup its losses. More importantly, as Judge Hassin recognized, Prof. Gollop never advanced any evidence to suggest that such prices might even conceivably be attainable. (A-Ap.131.)

Brooke Group requires showing not just a theoretical possibility of recoupment, but a "dangerous probability." 509 U.S. at 224. Prof. Gollop ignored this standard and also ignored – and certainly never attempted to assess – other factors that might prevent the *Journal Sentinel* from

recovering its "losses." Readers might simply choose to do without a newspaper if the price goes up too high. As the *Freeman*'s own managers testified, price increases impair circulation, reducing revenues. (R.31, Doyle 52:3-19; Stapelfeldt 64:5-10.) Moreover, raising subscription prices could create a twofold loss – a loss of subscribers plus the correlated loss in advertising revenue. (*See, e.g.*, R.17: Hoffman ¶7.) It is clear that Prof. Gollop and Conley have no idea how much money is supposedly at stake in the alleged scheme, or how, or whether, *Journal Sentinel* could recover those sums. In the absence of such evidence, neither could a jury.

2. Prof. Gollop's analysis "makes no economic sense" given the realities of the marketplace. *See Matsushita*, 475 U.S. at 587 (more persuasive evidence than usual is required to support claims that "make[] no economic sense"). He ignores the material fact that the *Freeman* is not the only constraint on *Journal Sentinel* prices.

If Prof. Gollop's theory bore any relation to reality, the *Journal Sentinel* would not offer these conversion packages in areas where Conley claims the *Journal Sentinel* has a monopoly. Indeed, under Prof. Gollop's rationale, one would expect the *Journal Sentinel* to be charging much higher prices in these "monopoly" areas and lower prices in Waukesha. However, the undisputed fact is that the *Journal Sentinel*'s subscription rate is uniform throughout the metro area. (R.17: Baseman ¶¶59-61; Hoffman ¶14; Pierce ¶¶2, 4.)

The discounts make rational business sense regardless of competition with the *Freeman,* and *Journal Sentinel* would face the same restraints in Waukesha County it

faces elsewhere were it to try to raise prices in Waukesha County after the *Freeman*'s hypothetical demise. Prof. Gollop does not dispute either the existence or the relevance of these market factors. He simply ignores them, and the resulting void in Conley's evidence means there is no genuine issue of material fact sufficient to avoid summary judgment.[8]

* * *

Recognizing the absence of factual predicates in Prof. Gollop's recoupment analysis, Judge Hassin properly dismissed the claim. Conley failed to meet the plaintiff's burden on summary judgment "to make a showing sufficient to establish the existence of an element essential to that party's case." *Transportation Ins. Co.*, 179 Wis. at 292, 507 N.W.2d at 140 (internal quotation omitted); *Yahnke v. Carson*, 2000 WI 74, ¶19, 236 Wis. 2d 257, 613 N.W.2d 102.

D. Conley showed no evidence of conversion revenues being below cost; its expert acknowledged the relevance of advertising revenue attributable to increased circulation, but did not consider it.

In addition to Conley's failure to show a dangerous probability of recoupment, an even more fundamental failure was the absence of evidence that the *Journal Sentinel*

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[8] Conley misses the point with its suggestion (Br.27) that monopoly power should replace recoupment as the second element. Even a monopolist faces limits on its ability to raise prices. Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* §1.2 at 14 (West "Hornbook Series" 2d Ed. 1999). Evidence of eventual monopoly is not the same as saying that the monopolist will be able to recover its predatory "investment."

Sunday-daily conversion revenue was below an appropriate measure of cost in the first instance. Only revenues below cost are predatory, something even Conley's proposed theory acknowledges. (*See* Br.26.)

Allegations of predatory pricing must be based on an "appropriate measure of ... costs." *Brooke Group*, 509 U.S. at 222. Conley's revenue/cost equation, however, was not "appropriate," because it is contrary to basic principles of newspaper economics, which Prof. Gollop himself acknowledged. No law or economic theory says newspapers must cover costs with subscription revenue alone. Indeed, there are thousands of newspapers in the United States that are distributed for free. (R.17: Baseman ¶67.) Radio and television stations do not charge their listeners. Most internet sites are free. But no one would contend they are engaged in price predation.

Subscription fees typically account for only 20-25% of a newspaper's revenues; the rest comes from advertising. (R.17: Kackley ¶18.) Therefore, subscription rates are often discounted because circulation is the vehicle that newspapers use to generate advertising sales. (R.17: Baseman ¶¶64-65; Kackley ¶3; Hoffman ¶7.) Distributing more newspapers allows a newspaper to charge higher rates for advertising. (*Id.*; *see also* Baseman ¶68.) And there is also the intended possibility that a discounted subscription will be renewed at full rates. (R.17: Hoffman ¶8.)

Prof. Gollop understood the logical business relationship between circulation and advertising. He agreed that "one of the reasons a newspaper wants to maintain or increase its circulation is to maintain or increase its advertising revenue." (R.17: Gollop 50:17-20.) He agreed that the purpose of the Sunday-daily conversion program is to

"try to build circulation for advertising purposes." (R.17: Gollop 96:2-3.)

Yet having acknowledge those facts, Prof. Gollop ignored them, leaving his analysis – and his *ipse dixit* conclusion based upon that analysis – deficient as a matter of law.

Prof. Gollop ignored entirely the advertising revenue the *Journal Sentinel* generates from each new subscriber.[9] He also made no attempt to account for the revenue associated with discounted subscriptions renewed at full price. It's as if, in looking at a drug store's revenues, he counted only cash and checks but ignored credit card receipts. This view of "below cost pricing" is discredited by the admissions of the *Freeman*'s own circulation managers, who recognize that "even though that particular order might not be profitable, it's worth getting because of the long-term benefit" to the paper. (R.17: Hohnberger 35:8-18.)

A newspaper situation similar to this one arose in *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48 (2d Cir. 1979). Important to this case, the Second Circuit held that "there was no sufficient evidence that the five week [free] sampling would produce even a short-term loss for the *News*' operations *taken as a whole*." *Id.* at 55 (emphasis added). *See also Kentmaster Mfg. Co. v. Jarvis Prods. Corp.*, 146 F.3d 691, 694 (9th Cir. 1998) (affirming dismissal of all claims; defendants' practice of providing free meatcutting equipment was not illegal when defendant more than made up its losses on continuing sales of re-

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[9] The record is undisputed that the actual amount per daily subscriber is $200 annually.

placement parts), *amended by* 164 F.3d 1243 (9th Cir. 1999).

An analysis of offering products below cost must examine the revenue generated by the complete "product line," in this case the newspaper itself. The ABA's 1999 *Sample Jury Instructions in Civil Antitrust Cases*, at C-68 (1999 ed.) (which Conley cited below (R.23:45)), state the law:

> ***Instruction 9***
> ***What Products Must Be Considered in Determining Whether Prices Are Below Cost***
>
> In determining whether defendant sold at a price below its reasonably anticipated costs, ***you must consider defendant's prices on all products in the same product line and defendant's costs for that product line as a whole.*** For example, if defendant's price for one size or package of its product is below its cost, but the prices that it will receive on other sizes and packages of the same product are sufficient to recover all of the defendant's cost on that product line, you may not base a verdict of predatory pricing on the one below-cost price. [*Consider inserting a description of the product offering based on the record in the case.*] ***To find for plaintiff on this element you must find that the defendant's prices for the product line, as a whole, were not reasonably anticipated to return defendant's cost on that product line, as a whole.***

Sample Jury Instructions, at C-68 (emphasis added).

Prof. Gollop's strained and incomplete analysis is not "an appropriate measure of ... costs," *Brooke Group*, 509 U.S. at 222, and is insufficient to support Conley's claim as

a matter of law, as Judge Hassin correctly held. (A-Ap.131.)

E. Conley's resort to allegations of "intent" and "targeting" does not overcome the absence of evidence of predatory conduct.

Conley complains that the *Journal Sentinel* "targeted" *Freeman* readers and tried to win their business. (*See* Br.4-6.) But that is not unlawful or even unusual. "Targeting" the *Freeman* is nothing more than competition, that which the antitrust laws seek most to *encourage*.[10]

Courts have recognized that competition is a harsh fact of life – and death – for newspapers.

> The economics of the newspaper industry have made it virtually impossible for more than one general circulation daily newspaper to survive in competition in the same city. When one newspaper rises to a certain dominance in a geographic area, advertisers are able to reach their intended audiences with placements in one newspaper rather than two or more; to cut

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[10] Conley mischaracterizes the *Journal Sentinel* marketing efforts in this period, which were far broader than just Waukesha County. *See, e.g.*, R.27 Ex. I, 1997 Marketing Plan, pg. D0010137 *et seq.*, describing a wide-ranging effort including in-store sales, fund-raising sales, special events, single-copy inserts, targeted direct mail, bill inserts, college sales and a number of discounted rate packages, all available throughout the metro area.

Conley also misstates the record when it says *Journal Sentinel* had an " 'aggressive campaign' to take subscribers away from the *Freeman*." (Br.6.) This was in fact a reference to telemarketing directed to all of Waukesha County, where by far the majority of households do *not* take the *Freeman*. (*See* R.17: Baseman ¶¶18-19, 25 (discussing Freeman penetration rates).)

> advertising costs, advertisers have tended to eliminate advertising in the smaller general circulation papers. Since lower circulation rates lead to fewer advertisements, and fewer advertisements make a newspaper less attractive to readers who value the information advertisements provide, declines in advertising and circulation tend to aggravate one another. This process gathers momentum and the decline in a weaker newspaper's business becomes self-fulfilling, leading almost inevitably to its demise.

Reilly v. Hearst Corp., 107 F. Supp. 2d 1192, 1198 (N.D. Cal. 2000).

Nor can Conley argue that approaching *Freeman* readers with subscription offers (*see* Br.4) demonstrates intent to monopolize. "It is not illegal for a company to try to attract business, especially at the expense of a competitor. Such practices are everyday occurrences in the business world." *Independent Milk Producers Coop. v. Stoffel*, 102 Wis. 2d 1, 10, 298 N.W.2d 102, 106 (Ct. App. 1980). A pitch to a competitor's customers is "exactly what we would expect from a legitimate competitor." *Advo*, 51 F.3d at 1199.[11]

"Invariably, when courts admit evidence of intent, they find it difficult to distinguish between predatory and competitive acts." Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* at 354

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[11] The *Freeman*, in fact, pitched the *Journal Sentinel*'s customers. *Freeman* telemarketers who called homes already receiving the *Journal Sentinel* were told to say, "It's a good time to compare our newspaper to the Milwaukee newspaper and see which covers Waukesha County the best." (R.17: Hohnberger 53:16-22 and Ex. 20.)

(West "Hornbook Series" 2d Ed. 1999) (citation omitted). Prof. Gollop agreed that given the rapid growth and the favorable demographics of Waukesha County, "it would make sense for the *Journal* to focus there, sure." (R.17: Gollop 91:3-6.)

As a matter of law, Conley's contention that defendants "targeted" the *Freeman* is irrelevant because, at a minimum, it is as consistent with vigorous competition as it is with anticompetitive conduct.

III. Wisconsin's adherence to federal antitrust precedent is well-grounded and supports important Wisconsin policies.

Because of Conley's belated attack on the very law upon which it initially premised its claim, we respond here to the suggestion that this Court should refuse to follow federal precedent in this case.

A. Wisconsin's courts and legislature expect federal precedent to control.

Precedent, legislative intent, and sound policy compel a finding that *Brooke Group*'s standards should govern predatory pricing actions under §133.03.

1. Consistency, uniformity, and *stare decisis* are served by Wisconsin's longstanding reliance on federal precedent.

As affirmed by the Court of Appeals in its Certification, Wisconsin's policy for a century has been to conform Wisconsin antitrust decisions to those of the United States Supreme Court. (A-Ap.107, citing *Prentice v. Title Ins. Co.*, 176 Wis. 2d 714, 724, 500 N.W.2d 658, 662 (1993)).

This Court has explicitly held since at least 1914 that Wisconsin's antitrust statutes should be construed in accordance with federal precedent. *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 625, 147 N.W. 1058, 1066 (1914) (§133.03 (then §133.01) copies the federal statute and should receive the same interpretation). Before that, federal interpretation had applied *sub silentio* since the statute's first provisions were enacted in 1893. *Id.*

This Court has consistently reaffirmed *Pulp Wood's* rationale.[12] The Seventh Circuit Court of Appeals[13] and both U.S. District Courts in Wisconsin[14] have recognized and relied upon this long-standing principle of Wisconsin law.

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[12] *See, e.g., Prentice v. Title Ins. Co.*, 176 Wis. 2d 714, 724, 500 N.W.2d 658, 662 (1993); *Grams v. Boss*, 97 Wis. 2d 332, 346, 294 N.W.2d 473, 480 (1980); *State v. Waste Mgmt.*, 81 Wis. 2d 555, 569 n.12, 261 N.W.2d 147, 153 n.12 (1978); *City of Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 375, 243 N.W.2d 422, 428 (1976); *State ex rel. Nordell v. Kinney*, 62 Wis. 2d 558, 563, 215 N.W.2d 405, 407 (1974); *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 410, 198 N.W.2d 363, 367-68 (1972); *Reese v. Associated Hosp. Serv., Inc.*, 45 Wis. 2d 526, 532, 173 N.W.2d 661, 664 (1970); *State v. Lewis & Leidersdorf Co.*, 201 Wis. 543, 549, 230 N.W. 692, 694 (1930). Several cases refer to Wis. Stat. §133.01, which was renumbered to Wis. Stat. §133.03, effective May 8, 1980. *See* Wis. Stat. Ann. Ch. 133, Disp. Table (West 2001).

[13] *See, e.g., Westowne Shoes, Inc. v. Brown Group, Inc.*, 104 F.3d 994, 998 (7th Cir. 1997); *K-S Pharmacies, Inc. v. American Home Prods. Corp.*, 926 F.2d 728, 733 n.2 (7th Cir. 1992); *Henry G. Meigs, Inc. v. Empire Petroleum Co.*, 273 F.2d 424, 430 (7th Cir. 1960).

[14] *See, e.g., Lerma v. Univision Communications, Inc.*, 52 F. Supp. 2d 1011, 1015-16 (E.D. Wis. 1999); *Emergency One, Inc. v. Waterous Co.*, 23 F. Supp. 2d 959, 962 (E.D. Wis. 1998); *Rozema v. Marshfield Clinic*, 977 F. Supp. 1362, 1374 (W.D. Wis. 1997); *Amoco Oil Co. v. Cardinal Oil Co.*, 535 F. Supp. 661, 666 (E.D. Wis. 1982).

One reason that Wisconsin follows federal antitrust law is that both have the same goal: promoting competition (not protectionism). *See Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 190 Wis. 2d 650, 662, 529 N.W.2d 905, 909 (1995) (intent of Ch. 133 is "to achieve the aim of competition"); *Matsushita,* 475 U.S. at 594 (competition is "the very conduct the antitrust laws are designed to protect").

Wisconsin and the federal courts also agree on the use of summary judgment where "the factual context renders the nonmoving party's claim '*implausible,*' " requiring then that "the nonmovant 'must come forward with more persuasive evidence to support their claim than would otherwise be necessary.' " *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 664-65, 476 N.W.2d 593, 603 (Ct. App. 1991) (emphasis in original), quoting *Matsushita,* 475 U.S. at 587. *See also Yahnke*, 2000 WI 74, ¶19, 236 Wis. 2d at 269, 613 N.W.2d at 108 (affirming adoption of *Matsushita*).

Important to commerce, adherence to federal precedent promotes uniformity and "minimize[s] conflict between the enforcement of state and federal antitrust laws and [avoids] subjecting [state] businesses to divergent regulatory approaches to the same conduct." *Blewett v. Abbott Labs.*, 938 P.2d 842, 846 (Wash. Ct. App. 1997). Some states have codified the value of uniformity.[15]

Relying on federal precedent provides Wisconsin with a body of law that a state's courts could scarcely hope to match. As one example, a Lexis search on the words

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[15] *See* Ariz. Rev. Stat. §44-1412; Iowa Code §553.2; Mich. Comp. Laws §445.784(2); N.J. Stat. Ann. §56:9-18; N.M. Stat. Ann. §57-1-15.

"predatory pricing" produced 815 cases from the federal courts since 1960. As the Court of Appeals observed in its Certification, there is no Wisconsin law at all on the subject. (A-Ap.107.) Eschewing federal precedent would leave Wisconsin's citizens and courts without guidance on the myriad issues that predatory pricing cases present. Federal precedent provides the breadth of analysis and judicial experience needed for informed and predictable decision-making.

Adherence to federal precedent also reflects Wisconsin's policy of *stare decisis*. This Court recognizes the preeminence of precedence. *State v. City of Oak Creek*, 2000 WI 9, ¶ 55 n.27, 232 Wis. 2d 612, 605 N.W.2d 526. *Stare decisis* is "fundamental to a society governed by the rule of law." *Id.* (internal quotation omitted). *Stare decisis* promotes the consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. *See, e.g., State v. Outagamie County Bd. of Adjustment*, 2001 WI 78, ¶29, 244 Wis. 2d 613, 628 N.W.2d 376. "[D]eciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results," if legal precedent is open to revision in every case. *City of Oak Creek, id.* ¶55 n.27.

"Changing the law is justified only when precedent has become detrimental to coherence and consistency in the law." *Outagamie County Bd. of Adjustment, id.* ¶29 (internal quotation omitted). Abandoning *Brooke Group* and the great body of federal antitrust law with which it intertwines would create exactly the kind of incoherence and inconsistency that this Court seeks to avoid.

2. Adherence to federal precedent is the legislative intent.

The Wisconsin legislature intends that federal antitrust precedent apply in our state. For example, the major reworking of Ch. 133 in 1979 contained no instruction to abandon the policy of adherence to federal precedent, of which the legislature was well aware. (*See, e.g.*, drafting records for A.B. 831, 1979-1980 Leg., Gen. Session, (Wis. 1979), LRB-0155/1 at 3, referring to the policy.)

When a statute has received a contemporaneous and practical interpretation and the statute is re-enacted, the practical interpretation is regarded as presumptively the correct interpretation of the law. *State ex rel. City of West Allis v. Dieringer*, 275 Wis. 208, 220, 81 N.W.2d 533, 539 (1957). Once the legislature acquiesces, "the courts are henceforth constrained not to alter their construction; having correctly determined legislative intent, they have fulfilled their function." *Vincent v. Pabst Brewing Co.*, 47 Wis. 2d 120, 128, 177 N.W.2d 513, 516 (1970).

The Wisconsin legislature has shown that when it finds a federal antitrust ruling objectionable, it will respond. When *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), held that only direct purchasers could sue for price-fixing under federal law, the legislature promptly revised §133.18(1) to permit persons injured indirectly as well to sue under state law. *See* James D. Jeffries, *Trade Regulation Law: Activities of the 1979-80 Wisconsin Legislature*, 53 Wis. B. Bull. 26, 27 (June 1980). Whether to change Wisconsin's adherence to federal precedent for predatory pricing claims is likewise a matter for the legislature.

With the exception of some 17 states that responded to *Illinois Brick,* we have not located any state that has re-

jected federal antitrust precedent for Sherman Act §2 analogues, and Conley does not identify any. Indeed, it appears that without exception, states with a §2 analogue provide by either common law or statute that federal precedent is either controlling or persuasive. Even states without a direct Sherman Act analogue find federal case law pertinent authority. A standard reference, ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* (2d ed. 1999), collects the authorities, which are lengthy, and which are summarized for the Court's convenience in the State Law Digest attached to this brief.

B. Courts endorse *Brooke Group*.

Contrary to Conley's suggestion that *Brooke Group* is an aberration of limited precedential value, the courts have not questioned the wisdom of *Brooke Group* in the years since it issued. They have applied its analysis without revision or amendment.[16]

Moreover, the courts continue to endorse *Brooke Group*'s reasoning. They have explained that, in the absence of recoupment, below-cost pricing benefits consum-

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[16] *See, e.g.*, these published decisions just since 1998: *Bailey*, 284 F.3d at 1245; *Virgin Atlantic Airways Ltd.*, 257 F.3d at 271-72; *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.2d 465, 477-79 (5th Cir. 2000); *Bridges*, 201 F.3d at 13-14; *Stearns Airport Equip. Co.*, 170 F.3d at 528-31; *United States v. AMR Corp.*, 140 F. Supp. 2d 1141, 1208-15 (D. Kan. 2001); *National Parcel Servs., Inc. v. J.B. Hunt Logistics, Inc.*, 150 F.3d 970, 971 (8th Cir. 1998); *Mathias v. Daily News, L.P.*, 152 F. Supp. 2d 465, 470-74 (S.D.N.Y. 2001); *Bridges v. MacLean-Stevens Studios, Inc.*, 35 F. Supp. 2d 20, 28 (D. Me. 1998), *aff'd*, 201 F.3d 6 (1st Cir. 2000). *See also* ABA Section of Antitrust Law, *Antitrust Law Developments* 267-68 (5th ed. 2002) (summarizing the current state of predatory pricing law).

ers.[17] Similarly, courts have concluded that, given the limited prospects of success, rational businesses rarely, if ever, undertake predatory pricing schemes.[18] The courts have followed the Supreme Court in emphasizing the high cost of error in assessing predatory pricing liability.[19] And the courts have used summary judgment to dismiss deficient claims. *See* n.6, *supra.*

State courts that have considered *Brooke Group* have also adopted its reasoning and have noted the necessary re-

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[17] *See, e.g., Bailey*, 284 F.3d at 1245 (below-cost pricing "that is unaccompanied by an ability to recoup losses only serves to benefit, rather than injure, consumers"); *Advo, Inc.*, 51 F.3d at 1200 ("futile below-cost pricing effectively bestows a gift on consumers, and the Sherman Act does not condemn such inadvertent charity"); *Mathias*, 152 F. Supp. 2d at 473 ("Absent the reasonable possibility of success in such recoupment, below-cost pricing cannot be anticompetitive because a failed predatory pricing scheme only results in lower aggregate prices.").

[18] *See, e.g., Taylor Publ'g Co.*, 216 F.3d at 477 ("because the goal of such behavior is difficult to attain, [it] is unlikely to be attempted by rational businessmen" (internal quotation omitted)); *Stearns Airport Equip. Co.*, 170 F.3d at 528 n.9 ("predation as a strategy is so unlikely to reap rewards that it should not be inferred easily"); *AMR Corp.*, 140 F. Supp. 2d at 1209 (noting the "general implausibility of predatory pricing and the underlying notion of recoupment" (internal citation omitted)).

[19] *See, e.g., Taylor*, 216 F.3d at 477 (predatory pricing "is difficult to distinguish from conduct that benefits customers") (internal quotation omitted); *Stearns Airport Equip Co.*, 170 F.3d at 527 (the "central difficulty" with predatory pricing claims "is that the conduct alleged is difficult to distinguish from conduct that benefits consumers"); *National Parcel Servs.*, 150 F.3d at 971 ("[u]nfair pricing antitrust claims should be viewed with great caution and a skeptical eye") (internal quotation omitted).

coupment element in predatory pricing claims under state antitrust laws.[20]

In the nine years since it was issued, *Brooke Group* has garnered universal acceptance among courts. If there is a state or federal court that has even criticized *Brooke Group* in this context, Conley has not found it, and neither have we.

C. The Hovenkamp hornbook demonstrates *Brooke Group's* mainline acceptance.

The 1999 Hovenkamp hornbook cited by Conley (Br.20, 24-25) is worth reviewing, because it presents a mainline view of current antitrust law and because Conley presents a distorted picture of its contents. Conley's brief juxtaposes Prof. Hovenkamp's criticism of aspects of so-called Chicago School economic theories with his discussion of predatory pricing to make it appear that Prof. Hovenkamp is critical of *Brooke Group* as well.

In fact, Prof. Hovenkamp would like to see the hurdle set even higher for predatory pricing lawsuits to proceed to

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[20] *See, e.g., Martello v. Blue Cross & Blue Shield*, 795 A.2d 185, 205 (Md. Ct. Spec. App. 2002) (identifying recoupment as an element of a predatory pricing claim under the Maryland Antitrust Act), *cert. denied* 802 A.2d 439 (Md. 2002); *Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc.*, 659 A.2d 904, 931-32 (N.J. Super. Ct. App. Div. 1995) (identifying recoupment as an element of a predatory pricing claim under the New Jersey Antitrust Act); *cf. Caller-Times Publ'g Co. v. Triad Communications, Inc.*, 826 S.W.2d 576, 582 (Tex. 1992) (holding that, under the Texas Antitrust Act, a predatory pricing plaintiff "must prove that the alleged predator has an objectively reasonable expectation of recouping its losses from predatory pricing by charging higher prices later.").

a jury. "The law has been moving in that direction, although it still has some distance to go." Hovenkamp, *supra*, at 66.

Prof. Hovenkamp discusses predatory pricing in detail in Chapter 8 of his text. It is clear from his explanation that while modern predatory pricing theory may have originated in Chicago School research, support for it now is broad and deep. As an example, Prof. Hovenkamp's acceptance of *Brooke Group* arises from a "catholic" approach that questions certain Chicago School theories, and he does not see economics as the exclusive consideration in antitrust law. *Id.* at 67.

The current law embodied in *Brooke Group* and related cases grew not out of a "Chicago School 'consensus' " (Br.23) but out of some 25 years of judicial examination and deliberation, beginning with consideration of the 1975 "Areeda-Turner Test" for predatory pricing. *Id.* at 338-39. Conley's attempt to dismiss more than two decades of legal development as an aberration fomented by one school of economic thought is both simplistic and erroneous.

Conley's call for a return to "first principles" (Br.26), begs the question. Which "first principles" is Wisconsin to pick? The 1930s New Deal concept that "price competition was unworkable and inefficient"? Hovenkamp, *supra*, at 56. The "almost paranoid" enforcement of restraints on vertical practices following World War II? *Id.* at 57. The "zealotry and expansiveness" of the pre-Chicago era Conley favors? *Id.* at 58.

No. Wisconsin follows federal antitrust policies as they develop. Prof. Hovenkamp says of everything since the 1960s, "we are speaking not of history but of *current*

policy." *Id.* (emphasis added). Wisconsin adopts "current policy" without shame or apology, and for good reason, consistent with its longstanding acceptance of federal law. *Brooke Group* and its progeny are "current policy" on predatory pricing and control this case under the historic precedents of this Court.

D. Conley's "Post-Chicago" authors actually accept the *Brooke Group* basics.

Pointing largely to a single "Post-Chicago School" law review article, Conley attempts to argue that federal antitrust law is "transitory" (Br.22) and that academe now views *Brooke Group*'s "intellectual underpinnings" as wrongheaded (Br.20, and discussing Patrick Bolton *et al.*, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L.J. 2239, 2241 (2000) ("Bolton I")).

Conley overlooks the salient fact that the Bolton authors generally accept *Brooke Group*'s key elements despite dissatisfaction with other aspects. The authors continue to see probable recoupment as an integral element of any predatory pricing case. Bolton I at 2264. Responding to criticism, they concede that predatory pricing "is not commonplace" and only "arises under special circumstances," Patrick Bolton, et al., *Predatory Pricing: Response to Critique and Further Elaboration*, 89 Geo. L.J. 2495, 2504 (2001), which are not present here, *see* Bolton I at 2242, 2285-2322. Indeed, the authors declare that recoupment should "operate as a screening mechanism," just as *Brooke Group* suggests, and that questions of pricing and business justification need not be addressed if the plaintiff cannot establish probable recoupment. *Id.* at 2264.

Contrary to Conley's portrayal of the article as a wholesale rejection of *Brooke Group*, the article only tries to massage the far edges of its economic underpinnings. Even if the Bolton article, rather than decades of federal and state judicial precedent, guided the inquiry, Conley would gain no support.

Post-Chicago academics like the Bolton authors are themselves subject to criticism. Others call their models "notably fragile" and based on "highly qualified assumptions ... that are not readily observable." Kenneth G. Elzinga & David E. Mills, *Predatory Pricing and Strategic Theory*, 89 Geo. L.J. 2475, 2478 (2001). Courts looking for precedent need not sort out competing academic theories, however. Judicial teaching arising from *Brooke Group* is plentiful and robust. *See* Sec. B, *supra*.

IV. Conley failed to offer a damage theory that would permit an estimate of damages without sheer speculation.

Conley's causation arguments (Br.28-33) are really damages arguments. To be recoverable, antitrust damages must be caused by conduct that violates the antitrust laws, not by lawful competition. Conley and its experts failed to even attempt to segregate the alleged wrong from the conceded right, so there is no basis on which a jury could have made a rational finding of either causation or damage, a fundamental flaw that is fatal to Conley's antitrust claim.

A. The requirement for disaggregation of damages is an important element of antitrust law.

In seeking damages, an antitrust plaintiff must segregate out the effects of its own mismanagement or of legitimate forces at work in the marketplace. The Seventh

Circuit applied this rule in *MCI v. AT&T,* 708 F.2d 1081 (7th Cir. 1983).

> When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. . . . To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful.

Id. at 1162-63 (citations omitted) (rejecting plaintiff's proof of damages).[21]

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[21] Judge Hassin quoted this language with particular interest. (A-Ap.135.) This principle has been applied by numerous courts in a variety of circumstances. *See Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1243 (7th Cir. 1982) (wherever possible, an antitrust plaintiff must "disaggregate the damage sum and apportion the amount of damage caused by each of [the challenged] business practices."); *Southern Pac. Communications Co. v. AT&T,* 556 F. Supp. 825, 1090 (D.D.C. 1982) ("trier of fact must be able to determine from the damage evidence whether each of the particular actions alleged to form an antitrust violation 'materially contributed' to plaintiffs' injury."); *Litton Sys., Inc. v. AT&T,* 700 F.2d 785, 825 (2d Cir. 1983) (noting that courts have held that damage studies are inadequate when only some of the conduct complained of is found to be wrongful and damage study cannot be disaggregated); *In re IBM Peripheral EDP Devices Antitrust Litig.,* 481 F. Supp. 965, 1013-14 (N.D. Cal. 1979) (stressing that causation proof must be "closely connected to the individual acts complained of" and that the plaintiff must show "how much injury each act caused"); *Van Dyk Research Corp. v. Xerox Corp.*, 478 F. Supp. 1268, 1326 (D.N.J. 1979) (stating that "the plaintiff, in proving the fact of injury, must prove a direct and proximate causal connection between an alleged unlawful act and the plaintiff's alleged injury"); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 434 (N.D. Cal. 1978) (holding that the law requires antitrust plaintiffs, where possible, "to isolate the impact of each act" challenged as unlawful).

The requirement of "disaggregation" implements the legal principle that speculative damages are not permitted. *Blue Cross & Blue Shield v. Marshfield Clinic,* 152 F.3d 588 (7th Cir. 1998), a Wisconsin antitrust case grounded in part on Chap. 133, Stats., provides clear direction. In *Blue Cross*, Judge Crabb properly granted summary dismissal because "no reasonable jury could estimate the plaintiff's damages from the reports of the plaintiff's experts." *Id.* at 594. The Seventh Circuit found those expert reports "worthless" when, with one minor exception, they attributed the basis for all damages to the alleged unlawful division of markets, "with no correction for any other factor." *Id.* at 593 (relying on *Brooke Group* and other decisions). "So [Judge Crabb] was right to throw out the damages claim on summary judgment." *Id.* at 595.

A 2001 decision also stands as a model for this case. In *American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.,* 135 F. Supp. 2d 1031 (N.D. Cal. 2001), the plaintiff alleged antitrust violations by the nation's two largest bookseller chains. *Id.* at 1035. Opining on the causal connection between the challenged discounts and the damages claimed by plaintiffs, plaintiffs' expert did not take into account a number of market factors which defendants contended influenced profitability and consumers' buying decisions. *Id.* at 1037-41. Directly analogous to the approach of Mr. Degen in this case, the expert assumed that "the entire price differential between defendants and plaintiffs was illegal." *Id.* at 1040. As a result, *American Booksellers* concluded:

> The Fisher model contains entirely too many assumptions and simplifications that are not supported by real-world evidence. As a result, its conclusions . . . are entirely too speculative to support a jury verdict.

Id. at 1041-42.

The court granted summary judgment, holding that plaintiffs "cannot prove causation of actual injury without Fisher's expert testimony, because only expert testimony can demonstrate that any injury to plaintiffs was caused by defendants' unlawful conduct, and not because of lawful competition or other factors." *Id.* at 1042.

Summary judgment is appropriate here for exactly the same reason. Mr. Degen simply – and insufficiently as a matter of law – assumed that *all* of the *Freeman*'s market share loss since 1996 – every single lost customer and lost dollar – was caused by the *Journal Sentinel*'s allegedly predatory conduct.

But the *Freeman*'s own executives admitted they lost subscribers because they curtailed discounts, because the paper had been mismanaged under prior owners, and because the paper had focused on the City of Waukesha instead of the entire county. (*See* Sec. D, pp. 7-8, *supra*.) It is undisputed that afternoon newspapers like the *Freeman* are struggling, and eventually failing, throughout the country. (*See, e.g.*, R.17: Kackley ¶44-48.) The *Freeman* started its own "downward spiral" (*see* Br.9), and its experts simply failed to account for these and other competitive factors and natural market forces.

Journal Sentinel does not contend that an antitrust plaintiff must disaggregate its damages as to every possible cause of the damages claimed. But when the plaintiff itself admits that factors other than the claimed misconduct caused harm, plaintiff's failure to account for those factors means that only rank speculation can address causation

and damage. As Judge Hassin correctly held, such a failure of proof is fatal to the claim alleged. (A-Ap.137-38.)

B. Wisconsin policy likewise mandates causal disaggregation.

Judge Hassin's holding that "this Court is wholly without a factual basis by way of this record as to the causation issue" (A-Ap.137) was another way of saying that the Gollop and Degen analyses, even given full weight, were insufficient as a matter of law to support Conley's allegations that it suffered antitrust damages through the conduct of the *Journal Sentinel.*

Judge Hassin's ruling on this point was well grounded in Wisconsin law. He followed the direction of this Court, as expressed through then-Justice Abrahamson, in *Merco Distributing Corp. v. Commercial Police Alarm Co.*, 84 Wis. 2d 455, 267 N.W. 652 (1978):

> A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

A.-Ap. 137 (quoting from 84 Wis. 2d at 460, 267 N.W. at 655).

Recognizing the conceptual link between "disaggregation" and causation, Judge Hassin correctly noted that Conley's factually deficient expert evidence "assumes a causation that does not exist at least not demonstratively having existed." (A.-Ap. 138.) Accordingly, "it is the opinion of this Court that in usable form admissible at trial

there has been no evidence offered to disaggregate the damages." (*Id.*)

That ruling is fully grounded in Wisconsin law. In any action, a plaintiff cannot recover unless there is "a causal connection between the conduct and the injury; and ... an actual loss or damage as a result of the injury." *Martindale v. Ripp*, 2001 WI 113, ¶33, 246 Wis. 2d 67, 89, 629 N.W.2d 698, 707. "[R]ecovery for damages may be had for reasonably certain injurious consequences of the tortfeasor's negligent conduct, not for merely possible injurious consequences." *Sopha,* 230 Wis. 2d at 226-227, 601 N.W.2d at 634 (internal quotation omitted). *See also Kempfer v. Automated Finishing, Inc.,* 211 Wis. 2d 100, 130, 564 N.W.2d 692, 704 (1997) (employment case holding that "recovery will be denied if it is speculative and uncertain whether damage has been sustained....").

Conley points to *Reiman Assocs., Inc. v. R/A Adver., Inc.,* 102 Wis. 2d 305, 322, 306 N.W.2d 292, 301 (Ct. App. 1981) (Br.38), a passage that is actually an excerpt from *Corbin on Contracts*. A footnote in *Corbin* that both *Reiman* and Conley omitted makes precisely this point:

> In *Thomas v. Kasco Mills*, 218 F.2d 256 (4th Cir. 1955), a turkey grower sued a turkey feed manufacturer for losses in production of eggs and poults alleged to have been caused by defective feed. A directed verdict for the defendant was sustained. The plaintiff suffered unusual losses; but he did not prove their cause. The court said "there were many conditions other than food which affected the productivity and growth of the flocks; and *the expert testimony was too uncertain to supply the missing link.*"

5 *Corbin on Contracts* §999, at 25-26 n.23 (1964) (emphasis added).

Conley's reliance on *Merco* (Br.28-29) and *Wills v. Regan*, 58 Wis. 2d 328, 206 N.W.2d 398 (1973) (Br.30) also is unwarranted. On appeal, the question is whether the evidence would be sufficient to support a finding of causation. *Cf. Merco*, 84 Wis. 2d at 459, 267 N.W.2d at 654-55. But the Degen report cannot support causation because it makes no effort to account for a panoply of undisputed harmful market forces, including admittedly lawful conduct by the *Journal Sentinel*. And nothing in either *Merco* or *Wills* allows the jury to consider evidence that is mere speculation. *See, e.g., id.* at 460, 267 N.W.2d at 655. In sum, Conley's evidence provided no means by which a jury could assess or award damages without pure speculation and guesswork.

Conclusion

For the reasons stated, defendants-respondents Journal Communications Inc. and Journal Sentinel Inc. urge affirmance of the trial court's summary judgment

dismissal of all claims in this action, including the predatory pricing claim relating to subscriptions that is the lone subject of this appeal.

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Form and Length Certification

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,763 words.

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Appended State Law Digest

All states and the District of Columbia are accounted for below, either as relying upon, in some form, federal precedent for interpretation of state antitrust laws or, rarely as having no federal analogue. For additional details, *see* ABA Section of Antitrust Law, *State Antitrust Practice and Statutes* (2d ed. 1999), which is the source of this listing. This material is referenced in the brief at Sec. III.A.2.

1. Statutory deference to federal law in interpreting state Sherman Act analogues

A number of states' statutes containing an analogue to Section 2 of the Sherman Act also provide that interpretation of federal laws should be considered either controlling or persuasive authority by state courts:

1. Ariz. Rev. Stat. §44-1412 (West 2002)
2. Colo. Rev. Stat. §6-4-119 (2002)
3. Conn. Gen. Stat. §35-44b (2002)
4. D.C. Stat. §28-4515 (2002)
5. Fla. Stat. Ann. §542.32 (West 2002)
6. Haw. Rev. Stat. §480-3 (2001)
7. 740 Ill. Comp. Stat. 10/11 (2002)
8. Iowa Code §553.2 (2002)
9. Md. Code. Ann., Commercial Law §11-202(a)(2) (2002)
10. Mass. Gen. Laws Ann. ch. 93, §2 (West 2002)

11. Mich. Comp. Laws §445.784(2) (West 2002)

12. Mo. Rev. Stat. §416.141 (2002)

13. Mont. Code. Ann. §30-14-104 (2002)

14. Neb. Rev. Stat. §59-829 (2002)

15. N.H. Rev. Stat. Ann. §356:14 (2002)

16. N.J. Stat. Ann. §56:9-18 (West 2002)

17. N.M. Stat. Ann. §57-1-15 (Michie 2002)

18. Okla. Stat. tit. 79, §212 (2001)

19. Or. Rev. Stat. §646.715(2) (2001)

20. R.I. Gen. Laws §6-36-2(b) (2001)

21. Tex. Bus. & Com. Code Ann. §15.04(Vernon 2001)

22. Utah Code Ann. §76-10-926 (2002)

23. Va. Stat. §59.1-9.17 (West 2002)

24. Wash. Rev. Code Ann. §19.86.920 (West 2002)

25. W. Va. Code §47-18-16 (2002).

2. Common law adoption of federal law precedent for interpreting state antitrust law.

A number of other states have adopted federal precedent by judicial decision or, in the case of North Dakota, by attorney general's opinion.

26. Alabama: *Ex Parte Rice*, 67 So. 2d 825, 829 (Ala. 1953).

27. Alaska: *West v. Whitney-Fidalgo Seafoods, Inc.*, 628 P.2d 10, 14 (Alaska 1981).

28. Idaho: *Pope v. Intermountain Gas Co.*, 646 P.2d 988 (Idaho 1982).

29. Indiana: *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 721 n.27 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980) (collecting cases).

30. Kentucky: *Borg-Warner Protective Servs. Corp. v. Guardsmark, Inc.*, 946 F. Supp. 495, 499 n.5 (E.D. Ky. 1996), *aff'd without published op.*, 156 F.3d 1228, 1998 U.S. App. LEXIS 13073 (6th Cir. June 16, 1998).

31. Louisiana: *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 493 So. 2d 1149 (La. 1986).

32. Maine: *Onat v. Penobscot Bay Med. Ctr.*, 574 A.2d 872, 875 (Me. 1990).

33. Minnesota: *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 136 (Minn. Ct. App. 1987).

34. Mississippi: *NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1301 (Miss. 1980), *rev'd on other grounds*, 458 U.S. 886 (1982).

35. North Carolina: *Rose v. Vulcan Materials Co.*, 194 S.E.2d 521 (N.C. 1973).

36. North Dakota: 35 N.D. Op. Att'y Gen. 76, 108 (1981).

37. South Dakota: *Byre v. City of Chamberlain*, 362 N.W.2d 69 (S.D. 1985).

38. Tennessee: *State ex rel. Leech v. Levi Strauss & Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,558, at 76,972 n.2 (Tenn. Ch. Ct. Sept. 25, 1980).

3. States without direct Sherman Act analogues also rely on federal authority.

Federal law is also applied in some states without a direct analogue to Section 2.

39. Arkansas: *Ideal Plumbing Co. v. Benco, Inc.*, 382 F. Supp. 1161, 1168 (W.D. Ark. 1974) (applying federal case law to Arkansas version of Robinson-Patman Act), *aff'd*, 529 F.3d 972 (8th Cir. 1976).

40. Delaware: Del. Code Ann. tit. 6, §2113 (2001).

41. Georgia: *State v. Shepherd Constr. Co.*, 281 S.E.2d 151, 154 (Ga.), *cert. denied*, 454 U.S. 1055, *appeal dismissed*, 454 U.S. 1074 (1981) (applying federal case law to Georgia version of unfair competition statute).

42. Nevada: Nev. Rev. Stat. 598A.050 (2002)

43. Pennsylvania: *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1015 (3d Cir. 1994) (applying federal case law to state common law antitrust claim).

44. South Carolina: *Drs. Steuer & Latham, P.A. v. National Med. Enters.*, 672 F. Supp. 1489, 1521 (D.S.C. 1987) (applying federal case law to state statutory unfair competition claim), *aff'd without published op.*, 846 F.2d 70 (4th Cir. 1988).

4. States without Sherman Act §2 analogues.

45. The California Cartright Act does not have a state analogue to §2 and "[c]ase law is mixed on

the extent to which the Act reaches conduct prohibited by Section 2."[22] There is no indication that California has specifically rejected any federal case law regarding monopolization, and California courts are often guided by federal case law. See *Vinci v. Waste Mgmt., Inc.*, 36 Cal. App. 4th 1811, 1814 n.1 (1995).

46. The text of Kansas' antitrust statutes varies considerably from the Sherman Act, and therefore Kansas has developed its own body of interpretive law. [23]

47. Unlike Section 2 of the Sherman Act, New York's Donnelly Act does not prohibit unilateral monopolization.[24] Nonetheless, New York courts generally follow "federal antitrust decisions in the absence of New York precedent interpreting the Act."[25]

48. Although the Ohio Valentine Act is textually different from the Sherman Act and has "broader and stronger terms" than the Sherman Act, *List v. Burley Tobacco Growers' Coop. Ass'n*, 151 N.E. 471, 474 (Ohio 1926), Ohio courts have held that the Act should be construed in harmony with federal antitrust law. *C.K.&J.K, Inc. v. Fairview Shopping Ctr. Corp.*, 407 N.E.2d 507 (Ohio 1980).

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[22] I ABA Section of Antitrust Law, State Antitrust Practice and Statutes, at 6-1 (2d ed. 1999).

[23] *See* I ABA Section of Antitrust Law, State Antitrust Practice and Statutes, at 18-3.

[24] II ABA Section of Antitrust Law, State Antitrust Practice and Statutes, at 34-1 (2d ed. 1999).

[25] II ABA Section of Antitrust Law, State Antitrust Practice and Statutes, at 34-1.

49. Wyoming appears to have no statutes or case law relating to federal interpretation.

5. Miscellaneous

50. Vermont has no antitrust law of general application.

51. Wisconsin, of course, is dealt with throughout the course of this brief.

SUPREME COURT OF WISCONSIN

Appeal No. 01-3128

CONLEY PUBLISHING GROUP, LTD.,
FREEMAN NEWSPAPERS LLC AND
LAKESHORE NEWSPAPERS, INC.,

Plaintiffs-Appellants,

v.

JOURNAL COMMUNICATIONS, INC. AND
JOURNAL SENTINEL, INC.,

Defendants-Respondents.

ON APPEAL FROM THE CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE DONALD HASSIN, PRESIDING
Case No. 00-CV-222

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I. THE COURT SHOULD REJECT THE JOURNAL'S INVITATION TO EMBRACE *BROOKE GROUP*.

The basic issue in this case is simple: Does this Court want to make it absolutely impossible for plaintiffs to bring predatory pricing cases under Chapter 133? If it does, the Court should accept the Journal's invitation and embrace *Brooke Group* and its progeny lock, stock, and barrel.

The Freeman submits, however, that is unwise public policy to simply eradicate--explicitly or in effect--a traditional cause of action unless the policy makers are absolutely convinced that the conduct in question poses no threat. When *Brooke Group* was decided, Chicago School antitrust theory reigned supreme. Its advocates persuaded courts that predatory pricing was "rarely tried, and even more rarely successful," and that the costs of allowing predatory pricing claims (largely in the form of chilling legitimate competitive behavior) exceed the benefits.

In our initial brief we argued that the Chicago School "consensus" which underpins the federal courts' hostility to predatory pricing claims has been crumbling. Indeed, in the 2001 edition of his book *Antitrust Law*, Judge Posner states that "recent scholarship has brought to light a nontrivial number of cases of predatory pricing."[1] He bases that statement on the article by Bolton, Brodley and Riordan[2] that the Freeman cited in its earlier briefs. Judge Posner also gives Bolton, et al. credit for "correctly identif[ying] the first edition [of Posner's *Antitrust Law*] as dissenting from the orthodox 'Chicago School' view that predatory pricing is never rational."[3]

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[1] Richard A. Posner, Antitrust Law 214 (2d edition 2001)
[2] Patrick A. Bolton, Joseph F. Brodley, and Michael H. Riordan, "Predatory Pricing: Strategic Theory and Legal Policy," 88 Georgetown Law Journal 2239 (2000).
[3] See Posner, note 1 above, 194 n. 2.

The Journal attempts to portray the Freeman as some kind of "bomb thrower" on these issues. The "first principles" approach we advocate, however, seeks a middle ground between eradicating predatory pricing as a cause of action and throwing open the courthouse doors to any disgruntled business owner who thinks his competitor's prices are "too low." As the Freeman has already argued, the aspect of *Brooke Group* that dooms all predatory pricing claims (and the rule on which Judge Hassin relied) is the second clause of the "recoupment" requirement:

> The plaintiff must demonstrate that there is a likelihood [1] that the predatory scheme alleged would cause a rise in prices above a competitive level [2] that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.[4]

Let us repeat what Areeda and Hovenkemp, "the nation's leading antitrust commentators,"[5] have said about Clause #2:

> The *Brooke* Court found insufficient proof to satisfy clause #1 of this formula and thus did not have occasion to consider whether clause #2 required proof not only of significant supracompetitive prices, actual or prospective but also of their amount or duration. We doubt that the Court meant the latter, for such detailed accounting is both impossible in antitrust litigation and beyond any of the three rationales for considering recoupment.[6]

And that is not all Areeda and Hovenkemp have to say about Clause #2:

> Antitrust law's predatory pricing requirement goes much further than its structural requirement in other types of antitrust cases. For example, in cases alleging monopolization by improper patent infringement litigation, the law does not require a showing that the value of any anticipated monopoly exceeds the cost of maintaining the wrongful suit. Nor does attempt law assess such a

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[4] 509 U.S. at 227-228.
[5] Appeal Brief of Defendants-Respondents at 18.
[6] Phillip E. Areeda & Herbert Hovenkemp, 3 *Antitrust Law* 322 (2d ed. 2002) (emphasis added).

> requirement. Although all Sherman Act § 2 cases require a "structural" showing that monopoly is plausible, only the law of predatory pricing exacts its much more strenuous "recoupment" requirement.[7]

The middle ground here is obvious: reject Clause #2, which was dictum in any event, and approach predatory pricing cases the same way the law approaches all other Sherman Act § 2 cases.[8] Because antitrust law exists to protect competition and not competitors, a plaintiff in a predatory pricing case should be required to make "a 'structural' showing that monopoly is plausible," in other words, to satisfy Clause #1 of *Brooke Group*. Unless a market is already highly concentrated (as the market in this case is), and unless there are high barriers to entry (as there are here), nothing the defendant does can harm competition anyway. This use of a structural "screen" to weed out implausible predatory pricing claims was actually proposed by Professors Joskow and Klevorick 14 years before *Brooke Group*.[9] As Joskow and Klevorick point out, "[f]or most firms in the economy, the first structural tier of our approach will eliminate any judicial inquiry into pricing behavior."[10] If, but only if, the plaintiff can make the structural showing, the case will proceed to the second phase, which examines the defendant's behavior.

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[7] *Id.* at 296 (emphasis added).

[8] In fact, the "structural" showing that Areeda and Hovenkemp refer to is also standard in "rule of reason" cases under § 1 of the Sherman Act. *See, e.g., Chicago Prof 'l Sports Ltd. P'ship v. NBA* 95 F. 3d 593, 600 (7th Cir. 1996) (stating that "[s]ubstantial market power is an indispensable ingredient of every claim under the full Rule of Reason").

[9] Paul E. Joskow and Alvin K. Klevorick, "A Framework for Analyzing Predatory Pricing Policy," 89 Yale L. J. 213 (1979).

[10] *Id.* at 258

II. A VARIETY OF EVIDENCE--INCLUDING EVIDENCE OF INTENT--IS RELEVANT TO THE BEHAVIORAL PHASE OF A PREDATORY PRICING CASE.

The relationship between the challenged prices and the defendant's costs is certainly one piece of evidence that helps illuminate whether the prices are predatory, but there are good reasons not to rely exclusively on simplistic price-cost tests, as the Journal advocates. Judge Posner, for example, points out that "the problem of measurement is apt to be acute."[11] Joskow and Klevorick agree:

> Any cost-based test creates a tremendous evidentiary burden on the plaintiff. . .. [T]he intelligent dominant firm may be able to 'cover its tracks' by using accounting techniques that can make any price cut appear remunerative. Hence, it may be difficult or impossible for the plaintiff and the court to ascertain the real costs.[12]

Moreover, courts and commentators disagree even as to which concept of cost, short-run marginal cost, long-run marginal cost, average variable cost, etc., should be used to evaluate whether a price is predatory.[13] Finally, some recent scholarship argues that even "above cost" pricing can be predatory, depending on the situation.[14]

In short, while price-cost analysis is relevant, it is not a silver bullet. While the Journal dismisses the notion that intent evidence should play any role, not all courts agree[15] and even Judge Posner's suggested approach would classify as predatory "selling below long-run marginal cost with intent to exclude a competitor."[16] A rational approach to predatory pricing would recognize that a variety of evidence (including intent) is

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[11] Posner, note 1, 215.
[12] Joskow and Klevorick, note 9, 261.
[13] ABA Section of Antitrust Law, Antitrust Law Developments 259 (5th ed. 2002). Posner, note 1, 215-217.
[14] *See, e.g.*, Aaron A. Edlin, "Stopping Above-Cost Predatory Pricing," 111 Yale L.J. 941 (2002).
[15] *See, e.g., McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).
[16] Posner, note 1, 215 (emphasis added).

relevant to evaluating the defendant's conduct once the structural "screen" has been performed.[17]

Here evidence of the Journal's predatory intent is abundant, as is evidence that it sold newspapers at less than marginal cost. The Journal continues to argue that its below cost sales were not predatory because it earned incremental advertising revenue. On this issue, the Freeman's expert and the Journal's experts disagree. The jury should hear all of the relevant evidence and decide.

III. THE JOURNAL'S ARGUMENT THAT "EVERYBODY DOES IT" SHOULD BE REJECTED.

The Journal points to products, such as broadcast TV and "shoppers", that are "given away" as a matter of course. From this, the Journal concludes that its own giveaway must have been lawful. But in the markets the Journal points to every seller gives the product away and the price stays at zero in the long run because that is the intrinsic nature of the business. Channel 12 isn't just offering free entertainment until it drives Channel 4 out of business at which point it plans to start charging (raising the price). Did the Journal plan to give away newspapers in Waukesha County forever?

The Journal's promotional pricing argument also falls flat, as the very case it cites makes clear. The conduct challenged in *Buffalo Courier Express* was a program that offered not 49 weeks, not 23 weeks, and not 9 weeks of free daily papers, but one free paper per week for 5 weeks.[18] The Second Circuit vacated an injunction limiting the program to two weeks because there was no evidence "to show that this was the limit of

[17] For example, in addition to price-cost relationships and intent, Judge Posner proposes to look at characteristics other than market structure "that make predatory pricing a plausibly rational strategy." These would include "whether the defendant operates in more markets than competitors and prospective entrants." Posner, note 1, 217.

[18] *Buffalo Courier Express v. Buffalo Evening News*, 601 F. 2d 48(2d Cir. 1979).

reasonableness—indeed in the face of evidence that other papers had offered [similar programs]."[19] But in the very same paragraph the court said:

> Doubtless the District Court could have held, even in the absence of evidence, that if the News had offered free copies to subscribers for ten weeks, that would have gone too far.[20]

IV. THIS COURT MAY DECLINE TO FOLLOW FEDERAL PRECEDENT.

A decision by the United States Supreme Court interpreting a federal statute *is not binding* on Wisconsin courts construing the federal statute's Wisconsin counterpart.[21] In fact, Wisconsin courts have often refused to follow federal cases interpreting a federal statute when the court is interpreting an identical or analogous state statute. In *Weber*, for example, this Court stated that while it is "appropriate to consider the federal rules in construing our derivative state statutes, we wish to underscore the fact that the effect we give to [the state rule] is a matter of state law and supersedes the federal court's interpretation of [the federal rule]."[22] In *Martin,* the Court of Appeals stated, "[w]e are not bound by federal law or decisions regarding employment discrimination and we will not follow them if they conflict with the intent of the WFEA."[23] Consistent with our federalist system of law, and contrary to what the Journal urges, this Court's hands are not tied.

The Journal warns of dire consequences if the Court rejects the draconian recoupment standard set forth (as dictum) in *Brooke Group*. But, as we have explained, the Freeman's proposed middle-ground approach would still use a version of recoupment

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[19] *Id.* at 55
[20] *Id.*
[21] *See, e.g., State v. Cardinas-Hernandez,* 219 Wis. 2d 516, 528, 579 N.W.2d 678 (1998) (emphasis supplied); *State v. Rochelt,* 165 Wis. 2d 373, 384, 477 N.W.2d 659, 664 (Ct. App. 1991); *State v. Blalock,* 150 Wis.2d 688, 702, 442 N.W. 2d 514, 519-520 (Ct. App. 1989).
[22] *Weber v. Weber,* 176 Wis. 2d 1085, 1092 n.7 (1993).
[23] *Martin Transp., Ltd. V. DIHLR,* 176 Wis. 2d 1012, 1021-22, 501 N.W. 2d 391, 395 (Ct. App. 1992).

in the form of a structural screen to weed out implausible predatory pricing claims. Only the most egregious cases--like this one--would go forward.

The Journal also argues that departing from federal predatory pricing law will cause utter chaos in the business community. Without the *Brooke Group* dictum and its progeny to guide them, business people's price cutting decisions might be chilled. We disagree, for at least three reasons. First, under the middle ground approach, unless a firm already has monopoly power in a market with high barriers to entry its pricing is immune from any legal challenge. Second, firms presumably know their own costs. If requiring a dominant firm to think twice before it charges a price below cost counts as "chilling" that firm's conduct, so be it. Third, laws change and develop over time, and businesses react accordingly. Uniformity is sometimes a laudable goal, but not at the expense of facilitating anticompetitive practices in Wisconsin.

V. THERE IS NO *DAUBERT* ISSUE IN THIS CASE.

Daubert[24] is not the law in Wisconsin and even if it were, Professor Gollop's opinion survives scrutiny. The Journal did not prove that Professor Gollop's methodology was somehow flawed – nor could it. Rather, the Journal hired its own experts, including Jerry Kackley, who disagreed with Professor Gollop. Judge Hassin improperly *weighed* this conflicting expert testimony and in doing so usurped the role of the jury.

VI. BECAUSE CONLEY OFFERED OVERWHELMING EVIDENCE THAT THE JOURNAL'S SUNDAY-DAILY CONVERSION SCHEME INJURED THE FREEMAN, THE ISSUE IS FOR THE JURY.

The Journal wants the Court to adopt special, more stringent rules for causation and damages in antitrust cases under Chapter 133. There is no plausible rationale for

[24] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

doing so. Indeed, express legislative intent and this Court's precedents argue, if anything, that the plaintiff's burden should be lightened in an antitrust case.[25]

A. The Journal's conduct injured the Freeman.

The evidence shows that the Freeman's subscription levels rose and fell depending on whether the Journal was giving away free daily newspapers. Common sense supports the inference that if a firm gives away free product, it will injure its competitor. The Journal's top-level marketing plans consistently express the Journal's intent to "target" and "convert" all remaining Freeman subscribers, so it is clear the Journal intended to cause Conley harm, and internal Journal documents confirm the scheme's success. As *Reiman* recognized, the tort "causation" standard has been defined in terms of "substantial factor" in Wisconsin at least since 1952. A jury could reasonably infer that the Journals' scheme to target Freeman subscribers was a substantial factor in causing the Freeman to lose subscribers.

Of course, at trial the Journal may attempt to show that Conley's injury was not caused by an antitrust violation but instead resulted from factors like changed economic conditions or mismanagement.[26] But even under federal antitrust law, where such evidence is offered resolution of the causation issue is for the trier of fact.[27]

B. The "disaggregation" doctrine adopted by some federal courts is inconsistent with Wisconsin law. In any event, the Freeman disaggregated its damages.

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[25] *See*, § 133.01, Wis. Stat.; *Carlson & Erickson Builders v. Lampert Yards, Inc.*, 190 Wis. 2d 650, 662, 529 N.W. 2d 905 (1995).

[26] *See, e.g., City of Long Beach v. Standard Oil Co.*, 972 F .2d 1401, 1408 (9th Cir. 1989); *United States Football League v. NFL*, 842 F. 2d 1335, 1377 (2nd Cir. 1988).

[27] *City of Long Beach*, 872 F. 2d at 1406; *White Indus. v. Cessna Aircraft Co.*, 845 F. 2d 1497, 1502 (8th Cir. 1988).

In Wisconsin, an injured plaintiff is not required to "segregate proportionately" all factors contributing to its injury.[28] And, where the plaintiff's total injury may have been the result of many factors in addition to the defendant's wrongdoing, *the defendant must pay damages equivalent to the total harm suffered, even though there were contributing factors other than his own conduct.*[29] This longstanding Wisconsin rule is incompatible with "disaggregation."

In any event, the Freeman's expert Carl Degen disaggregated its damages. The Journal wrongly contends that an antitrust plaintiff must enumerate every potential cause of an injury and attribute to each a percentage of the plaintiff's total damages. Thus, the Journal argues, Degen should have studied the Freeman's management, its previous management, its subscription prices, any trends toward or away from afternoon papers, etc. Then, he should have somehow assigned a percentage of the Freeman's total damages to each of these potential causes. This is not what "disaggregation" requires.

Disaggregation requires an antitrust plaintiff alleging two or more anticompetitive acts (or sets of acts) to break out damages attributable *to each anticompetitive act.*[30] Suppose a plaintiff harmed to the tune of $100 alleges three anticompetitive sets of acts: exclusionary contracts, price fixing, and predatory pricing. The plaintiff must separate out what portion of its $100 in damages resulted from each type of anticompetitive act. That way, if a jury finds liability on only *one* of the allegations, it can still determine the amount of damages attributable to that particular anticompetitive act.

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[28] *Reiman*, 102 Wis.2d at 321, 306 N.W.2d at 301 (citation omitted).
[29] *Id.* (emphasis supplied).
[30] The cases relied on by the Journal in footnote 21 of its Response Brief confirm Conley's interpretation. The cases hold that a plaintiff must "disaggregate *each of [the challenged] business practices*"; that "damage studies are inadequate when only *some of the conduct complained of is found to be unlawful*"; and that the plaintiff must "isolate the impact of "*each act" challenged as unlawful.* These are all ways of saying that if Conley alleges two anticompetitive practices, its damages report must separate out the damages attributable to each of those alleged practices. This is precisely what Conley has done.

This is *precisely* what Degen did. As Conley showed in its Initial Brief (p. 36--the Journal ignored the argument), Conley alleged two types of anticompetitive conduct: exclusionary advertising contracts and the predatory Sunday-daily conversion program. Degen attributed damages to each independently. Thus, if the jury finds the Sunday-daily conversion program to be anticompetitive, Degen has already provided calculations of damages attributable solely to that conduct.

CONCLUSION

This Court should reverse the circuit court and remand the case for trial on the merits.

Dated this 26th day of November, 2002.

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CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced using a proportional serif font. The length of this brief is 2917 words.

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STATE OF WISCONSIN
SUPREME COURT

No. 01-3128

CONLEY PUBLISHING GROUP, LTD.,
FREEMAN NEWSPAPERS LLC AND
LAKESHORE NEWSPAPERS, INC.,

Plaintiffs-Appellants,

v.

JOURNAL COMMUNICATIONS, INC. AND
JOURNAL SENTINEL, INC.,

Defendants-Respondents.

ON APPEAL FROM THE CIRCUIT COURT FOR
WAUKESHA COUNTY, THE HON. DONALD HASSIN, PRESIDING
CASE NO. 00-CV-222

BRIEF OF AMICUS CURIAE WISCONSIN UTILITIES ASSOCIATION

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INTRODUCTION

This Court has an important opportunity to develop Wisconsin's law of evidence. Specifically, as the Court of Appeals recognized in its certification, this case presents the question whether the Court should interpret Wisconsin's rule concerning the admission of expert testimony consistently with the interpretation given to identical language by the United States Supreme Court and with the approach taken by a majority of other state supreme courts.

For reasons developed below, the Court should hold that Wis. Stat. § 907.02, like Federal Rule of Evidence 702, requires a trial court to make a threshold determination that proffered expert evidence satisfies certain basic criteria of reliability before the court admits the evidence. As the United States Supreme Court, considering identical language, recognized in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the text of § 907.02 requires this conclusion. Policy reasons support this result as well.

INTEREST OF AMICUS CURIAE

The Wisconsin Utilities Association ("WUA") is a non-profit organization made up of public and private electric and natural gas utilities doing business in Wisconsin. Combined, these utilities serve over 7 million electric customers and 3 million gas customers both inside and outside of Wisconsin and employ over 20,000 individuals. The nature and reach of WUA members' operations mean that these utilities find themselves frequently involved in litigation in the courts in Wisconsin, both as a plaintiff and as a defendant. These cases commonly involve as a central element of proof the use or attempted use by the different parties of expert witnesses.

Based on its members' experience in litigation in both federal and state courts, WUA believes that it is important for Wisconsin trial courts to perform a "gatekeeper" role in determining whether proposed expert testimony is both relevant ***and*** reliable. Although all parties to litigation should have an interest in such a correct interpretation of the text of Wis. Stat. § 907.02, this is of particular importance to WUA. The character of its members' operations and interactions with the

public, and in particular the fact that these companies frequently are under a statutory ***duty*** to serve the public, *see* Wis. Stat. § 196.03(1), mean that the companies are especially likely to be the subject of tenuous claims in litigation. In these circumstances, it is important to WUA that appropriate evidentiary standards be applied in litigation and, in particular, that spurious lawsuits not be facilitated by a standard for the admission of expert evidence that cannot be squared with the text of Wis. Stat. § 907.02.

ARGUMENT

I. WIS. STAT. § 907.02 REQUIRES A TRIAL COURT TO MAKE A THRESHOLD DETERMINATION OF RELIABILITY BEFORE ADMITTING EXPERT EVIDENCE.

A. Wisconsin Adopted Provisions Such As § 907.02 in Order to Align the Wisconsin and Federal Rules of Evidence.

Federal Rule of Evidence 702 as considered in *Daubert* and Wis. Stat. § 907.02 are identical. Both provisions, adopted in the mid-1970's, state as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training,

or education, may testify thereto in the form of an opinion or otherwise."[1]

This identity is purposeful: "'uniformity with the Proposed Federal Rules was the overriding principle'" that guided the formulation of Wisconsin's law of evidence. *State v. Whitaker*, 167 Wis. 2d 247, 261, 481 N.W.2d 649, 654 (Ct. App. 1992) (quoting J. Decker, *A New Wisconsin Evidence Code?*, 56 Marq. L. Rev. preface (1973)). Judge Decker, the Reporter for the Drafting Committee, gave this further contemporaneous explanation:

> [I]t was thought that a Wisconsin trial lawyer should not be required to be skilled in two potentially contradictory systems of evidence. Changes from the federal rules were proposed only in instances where legal tradition or legislative enactment seemed substantially compelling or where Wisconsin law was more advanced. The differences are not substantial enough to stimulate forum shopping nor to complicate the mastery of both codes by the bar.

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[1] In 2000, the Supreme Court amended Federal Rule of Evidence 702 in order to reflect the interpretive developments set forth in *Daubert* and the subsequent cases of *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). This subsequent amendment does not alter the essential fact that these cases set forth interpretations of the very same language at issue here. *Cf. infra* p. 8 n.3.

Id. (quoting same). This uniformity principle has subsequently led this Court, in construing Wisconsin's rules of evidence, to "look to federal cases interpreting and applying the federal rules of evidence." *State v. Cardenas-Hernandez*, 219 Wis. 2d 516, 528, ¶ 15, 579 N.W.2d 678, 684 (1998). The purpose of these inquiries has been not merely for the Court to locate "persuasive authority," *id.*, but in fact, as originally intended, "[t]o achieve uniformity between the federal and Wisconsin rules of evidence." *State v. Gray*, 225 Wis. 2d 39, 60, ¶ 41, n.6, 590 N.W.2d 918, 929 n.6 (1999).[2]

B. The Courts Have Taken Important Steps to Give Effect to the Standard for Expert Testimony in § 907.02.

The meaning of former Federal Rule of Evidence 702 and its identical (and still-current) counterpart Wis. Stat. § 907.02 has been the subject of a series of important cases in both the federal and state supreme courts. Two cases are

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[2] *See, e.g.*, *Gray*, 225 Wis. 2d at 60 n.6, 590 N.W.2d at 929 n.6 (following federal law in interpreting §§ 901.04 & 904.04 – conditional relevancy and other acts evidence); *Cardenas-Hernandez*, 219 Wis. 2d at 527-28, 579 N.W.2d at 684 (same for § 908.01 – hearsay); *State v. Masselt*, 185 Wis. 2d 254, 266-67, 518 N.W.2d 232, 237 (1994) (same for § 906.06 – juror testimony); *Whitaker*, 167 Wis. 2d at 260-61, 481 N.W.2d at 654-55 (same for § 901.04(1) – preliminary questions of admissibility).

particularly relevant here. First, in *State v. Walstad*, 119 Wis. 2d 483, 351 N.W.2d 469 (1984), this Court considered whether *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), provided the standard governing admission of scientific evidence. Under *Frye*, expert witness opinion testimony was inadmissible unless the underlying scientific techniques were "generally accepted" in the relevant scientific community. *Id.* at 1014. This Court in *Walstad* concluded both that *Frye* had never been the law in Wisconsin and that, in all events, "[t]he rules in regard to the admission of expert testimony are also clear" and did not impose *Frye*'s "general acceptance" criterion. 119 Wis. 2d at 516, 351 N.W.2d at 486.

Second, although it took somewhat longer, the United States Supreme Court reached the same conclusion concerning *Frye* under Federal Rule of Evidence 702. Specifically, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Court concluded that "the *Frye* test was superseded by the adoption of the Federal Rules of Evidence." *Id.* at 587. Simply put, *Frye*'s "general acceptance" test, the Court explained, was "absent from, and incompatible with, the Federal

Rules of Evidence." *Id.* at 589. The Court went on to explain that this did not mean that the trial judge was "disabled from screening [proffered expert evidence]. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* The Court explained that "[t]he primary locus of this obligation is Rule 702," whose text requires, among other things, scientific or other specialized "*knowledge*." *Id.* (emphasis in original).

C. The Court Should Give Effect to the Remainder of the Text of § 907.02 by Enforcing the Requirement That Proffered Expert Evidence Be Reliable.

This case presents the opportunity for the Court now to complete the process it began in *Walstad*. Just as that case anticipated the primary holding of *Daubert* by recognizing that the language of § 907.02 does not include *Frye*'s "general acceptance" requirement but rather requires that the evidence be relevant, so this case presents the next question, also raised and resolved in *Daubert*: whether the text of the rule requires, in addition to relevance, a threshold determination of reliability. An affirmative answer to this question follows from basic

textual interpretation and does not require the overruling of any of the Court's decisions.[3]

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[3] As one commentator has observed, *Walstad* and *Daubert* "shar[e] critical common ground," in that they "agree that relevancy is the baseline of admissibility." Daniel D. Blinka, *Scientific Evidence in Wisconsin After Daubert*, Wis. Lawyer, Nov. 1993, at 10, 12. The difference arises simply because whereas this Court in *Walstad* centered its entire discussion around demonstrating "that the trial judge's reliance upon *Frye* does not find support in the law of evidence in Wisconsin," 119 Wis. 2d at 519, 351 N.W.2d at 487, the Supreme Court in *Daubert* proceeded ***further***, after reaching the same conclusion about *Frye* under federal law, to expound upon the requirements that *are* found in the text of Federal Rule of Evidence 702. The fact that the approach followed by *Daubert* and advocated in this brief is ***an interpretation of the text*** of § 907.02 is a complete response to the suggestion of amicus Wisconsin Academy of Trial Lawyers ("WATL") that for this Court to adopt *Daubert* would require amending the rules of evidence. While that may be an ***alternative*** approach, WATL's suggestion provides no basis for this Court to abdicate its duty to decide whether § 907.02, as it stands today, imposes a threshold reliability determination.

It should also be noted that the Court of Appeals technically overstates the matter when it says that this case "presents the supreme court with the opportunity (or perhaps necessity) of revisiting the Wisconsin rejection of the trial court's 'gatekeeper' function under *Daubert*." Certification, at 11 (Appendix to Brief of Plaintiffs-Appellants at A-Ap. 113). ***This*** Court has never "rejected" *Daubert*'s interpretation of Federal Rule of Evidence 702, and in fact has never determined whether, in light of the reasoning of *Daubert*, Wisconsin's analogue, § 907.02, mandates a role for trial courts to determine the "reliability" of proposed expert testimony. It is presumably to address this question that this Court granted the certification on "all issues," A-Ap. 101, and further granted the motions of both WUA and WATL for leave to file amicus briefs specifically directed to this particular issue. While the parties have downplayed this *Daubert* issue in their briefing, it is an important issue that is likely to arise again and should therefore be resolved by this Court. *See, e.g.*, *State v. Leitner*, 2002 WI 77, ¶¶ 14-15, 253 Wis. 2d 449, 458-59, 646 N.W.2d 341, 345-46 (2002) (describing circumstances in which the Court will determine a matter even though "that determination can have no practical effect on the immediate parties").

Specifically, this Court should hold, in accordance with *Daubert*, that § 907.02 requires trial courts to act as a "gatekeeper" and to allow the admission of expert testimony only upon a showing that it is both relevant ***and*** reliable. The text of the rule compels this conclusion. The relevancy criterion arises from the rule's requirement that testimony "assist the trier of fact," and the reliability criterion is created by the rule's requirement that testimony be based on "knowledge." *Daubert*, 509 U.S. at 589-92; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (holding that the *Daubert* "gatekeeping" standard applies to ***all*** expert testimony because the term "knowledge" in Rule 702, and not the adjectives "scientific" or "technical," establishes the "standard of evidentiary reliability").

The reliability analysis should be a "flexible one," with the trial court having considerable latitude "in deciding ***how*** to test an expert's reliability" and focusing "solely on principles and methodology, not on the conclusions they generate." *Daubert*, 509 U.S. at 594-95; *see also id.* at 593-95 (giving examples of factors that a court might consider in determining

whether scientific evidence meets requirement of reliability).

The Court explained thus in *Kumho Tire*:

> The objective of [the gatekeeping] requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.

Kumho Tire, 526 U.S. at 152.[4] This approach, by navigating according to the ***text*** of § 907.02, avoids both the rock of *Frye*, which was "at odds with the 'liberal thrust' of the Federal Rules [of Evidence]," *Daubert*, 509 U.S. at 588, and the whirlpool of a mere relevancy rule, which has been correctly criticized as "creat[ing] undue reliance on expert witnesses." *See Walstad*, 119 Wis. 2d at 519 n. 13, 351 N.W.2d at 487 n.13.

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[4] Thus, for example, a television repairman will likely not be criticized for a lack of publication, while a nuclear physicist probably will not be qualified based solely upon experience in the field. Daniel D. Blinka, *Wisconsin Practice: Evidence*, § 702.3 (2d ed 2001).

II. ALTHOUGH THE FOREGOING TEXTUAL ANALYSIS OF WIS. STAT. § 907.02 IS DISPOSITIVE, POLICY CONSIDERATIONS AS WELL SUPPORT THE EVIDENTIARY-RELIABILITY REQUIREMENT.

A. A Growing Majority of States Follow the Interpretation Set Forth in *Daubert*.

First, only an ever-diminishing minority of jurisdictions admit any "relevant" expert testimony regardless of the reliability of the theory or principles underlying the testimony. *See Schafersman v. Agland Coop*, 631 N.W.2d 862, 872-76 (Neb. 2001) (identifying Nebraska as the 28th state to adopt *Daubert* standards); Alice B. Lustre, Annotation, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R.5th 453 (2001) (identifying Wisconsin as among only 4 states that continue to employ their own tests). While this overwhelming evidence of how other courts have interpreted the same language as that contained in § 907.02 does not bind this Court, amicus submits that it has considerable persuasive force.

Furthermore, where the text to be interpreted is an evidence code adopted specifically to provide consistency with

other jurisdictions, the fact that a growing consensus exists regarding the meaning of the code is critically important. As one of the most recent opinions from a state supreme court on the topic noted, "courts risk losing the benefit of helpful and persuasive authority from other jurisdictions on newly presented evidentiary issues by their continued reliance on a test that is being increasingly removed from the jurisprudential mainstream." *Schafersman*, 631 N.W.2d at 873.

Even beyond those benefits, aligning Wisconsin with the mainstream lessens the risk of forum-shopping. Under current law, Wisconsin can only be regarded as a "friendly" jurisdiction for cases relying upon unsupported science or other shaky expert testimony. This thus eliminates one of the reasons that Wisconsin patterned provisions such as § 907.02 after the Federal Rules of Evidence—which was, as Judge Decker explained at the time, to discourage forum-shopping. *See supra* p. 4.

B. Adopting a Threshold Reliability Requirement Will Result in More Reliable Verdicts and Decisions.

In addition, that the rule for expert testimony would contain threshold criteria of reliability and relevancy makes sense—indeed, is important—in the larger evidentiary framework. The creators of this framework "contemplate[d] some degree of regulation of the subjects and theories about which an expert may testify." *Daubert*, 509 U.S. at 589. The reason for such regulation is well stated by the United States Supreme Court:

> Unlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. See Rules 702 and 703. Presumably, this relaxation of the usual requirement of firsthand knowledge—a rule which represents "a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information'"—is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.

Daubert, 509 U.S. at 592 (citation omitted).

A mere "relevancy" standard, on the other hand, provides no categorical check on the reliability of expert opinion

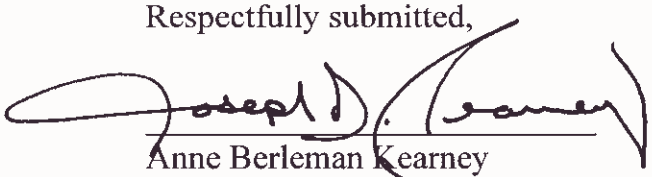
testimony. Rather, under this approach, as long as an expert is "qualified" and the proposed testimony is relevant to the issue at hand, the evidence is "admissible irrespective of the underlying theory on which the testimony [is] based." *Walstad*, 119 Wis. 2d at 518, 351 N.W.2d at 487. While this reasoning had some resonance in rejecting the *Frye* standard, whose focus upon the "general acceptance" in a relevant scientific "community" would preclude the admission of reliable but cutting-edge science, it is not a complete statement of the requirements of § 907.02 and, in all events, is less compelling than the "flexible" and "liberal" approach of *Daubert*. Ultimately, the uniquely relaxed standard of mere "relevancy" creates too big a risk that unreliable or "junk" science will mislead a jury. In short, a proper interpretation of provisions such as § 907.02, as exemplified in *Daubert* and *Kumho Tire*, "greatly improves the reliability of the information upon which verdicts and other legal decisions are based." *Schafersman*, 631 N.W.2d at 876; *see also State v. Porter*, 698 A.2d 739, 748-49 (Conn. 1997).

Giving effect to § 907.02's requirement of a threshold reliability determination respects the ability of juries to sift through evidence and find the truth. Even in this system, the judiciary retains the responsibility under the evidence code to winnow out improper, prejudicial, and in many cases objectively unreliable evidence (just as it does with respect to irrelevant evidence). The Supreme Court of the United States and the majority of other jurisdictions have struck this balance correctly: The rules surrounding expert witness testimony place the initial burden on the trial court, and not the jury, to determine whether proffered expert testimony is both relevant and reliable. Once this initial determination is made, the jury can properly assess whether the expert opinion (as opposed to the underlying methodology) is entitled to weight and whether it supports the ultimate fact at issue.

CONCLUSION

The Court should give effect to the language of Wis. Stat. § 907.02 and hold that Wisconsin trial courts should admit proffered expert testimony only if the evidence meets the rule's requirements of relevancy and reliability.

Respectfully submitted,



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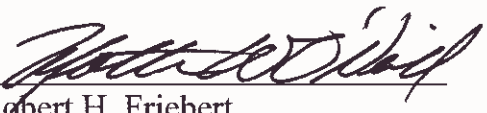

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Wis. Stats., for a brief produced with a proportional serif font. The length of this brief is 2,974 words.

Dated at Milwaukee, Wisconsin this 20th day of December, 2002.

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STATE OF WISCONSIN
SUPREME COURT

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STATEMENT OF AMICUS INTEREST

The Wisconsin Academy of Trial Lawyers ("WATL") is devoted to advocating the rights of the seriously injured in the State of Wisconsin. Its members are committed to insuring justice in the administration of tort law through the fair and efficient application of the Rules of Civil Procedure and the Rules of Evidence in Wisconsin courts. This case indirectly raises a serious issue with respect to the Rules of Evidence which is of great concern to members of WATL and all those interested in insuring that our courts are able to dispense justice efficiently and at a reasonable cost.

ARGUMENT

I. THE PARTIES AGREE THAT ON THE PRESENT RECORD *DAUBERT* IS NOT PROPERLY BEFORE THIS COURT; THIS COURT SHOULD NOT RENDER AN ADVISORY OPINION CONCERNING SUCH AN IMPORTANT MATTER.

In certifying this case to this Court, the Court of Appeals suggested, effectively by way of *dicta*, that this case "presents the Supreme Court with the opportunity (or perhaps necessity) of revisiting ... Wisconsin's rejection of the trial court's 'gatekeeper' function under [*Daubert v. Merrell Dow Pharmaceuticals,* 113 S. Ct. 2786, 509 U.S. 579, 125 L.Ed.2d 469 (1993)]." Court of Appeals July 31, 2002 Certification herein, p. 11. The Appellants in this case argue that the trial court could not act as a "gatekeeper" because Wisconsin has rejected *Daubert*. Appellants *Conley, et al.,* p. 17. The Respondents assert that *Daubert* "is not dispositive or even properly raised in this case," but then

state that "perhaps it is time for Wisconsin to adopt the *Daubert* standard. Respondents Journal Communications, *et al.*, p. 15.

The appellate courts of this State have consistently declined to adopt the *Daubert* rule. *Green v. Smith & Nephew AHP, Inc.*, 2000 WI App. 192, ¶ 21, 238 Wis. 2d 477, 497, 617 N.W.2d 881, 890. This case presents a paper-thin record upon which to consider a sea change as momentous as the adoption of the *Daubert* rule, and the parties have done little to assist the Court by providing a reasoned and detailed legal argument why Wisconsin should or should not consider such a change. In effect, this Court is being invited to resolve with finality difficult rules of evidence that are at best only tangentially related to the facts of this case, and to the extent it does so it will be in danger of rendering an advisory opinion. *Concurrence* of Justice Hansen, *State v. Washington,* 83 Wis. 2d 808, 851, 266 N.W.2d 597 (1978); *Concurrence of Chief Justice Abrahamson, State v. Sprosty,* 227 Wis. 2d 316, 595 N.W.2d 692 (1999) ("This court should not [render] an advisory opinion." *Id.* at 337).

II. THE RELEVANCY-ASSISTANCE STANDARD, WHICH HAS GOVERNED THE ADMSSIBILITY OF EXPERT EVIDENCE IN WISCONSIN COURTS FOR ALMOST TWO DECADES, HAS FUNCTIONED EFFECTIVELY AND EFFICIENTLY.

The admissibility of expert testimony in Wisconsin courts turns on three prime considerations: the relevancy of the testimony, the witness's qualifications, and the helpfulness of the expert's testimony in determining a fact in issue. *State v. Walstad*, 119 Wis.2d 483, 516, 351 N.W.2d 469, 485 (1984). Since its

articulation in *Walstad* nearly twenty years ago, this relevancy-assistance standard has assured probative expert testimony and provided a flexible approach that accommodates the wide-ranging use of experts in civil and criminal litigation. Absent from this record and, for that matter, the case law generally, are compelling, articulable reasons to shed a standard that has served Wisconsin's courts so long and so well.

This Court has repeatedly emphasized that the touchstone of expert testimony is its "assistance" or "helpfulness" in resolving factual issues. Indeed, trial courts have erred by narrowly restricting expert testimony to subjects "distinctly related to some science, profession, business, or occupation" deemed to be "'beyond the realm of the average lay person.'" *State v. Watson*, 227 Wis.2d 167, 190, 595 N.W.2d 403 (1999). In *Watson* this court explained the rule's underlying policy:

> Under Wis. Stat. § 907.02, if a witness is qualified as an expert and has specialized knowledge that is relevant because it will assist the trier of fact to understand the evidence or to determine a fact in issue, the expert's analysis or opinion will normally be admitted into evidence. That a lay witness of ordinary intelligence may also understand the subject matter does not mean that an expert in the field would not be of assistance to the trier of fact in issue.

Watson, *id.*, 227 Wis.2d at 187, 595 N.W.2d at 412.

In sum, when faced with "specialized knowledge" that might overlap to some extent with the vast, but uncertain borders of "general knowledge" (i.e., what "we" are all expected to know), trial courts are encouraged to provide expert assistance.

At the other end of the spectrum, where the expert's specialized

knowledge is undeniably esoteric, Wisconsin law also stands firmly behind the principle of assisting the trier of fact and manifests abiding faith in the adversary system of justice. *Walstad* holds that "expert testimony is admissible if relevant and will be excluded only if the testimony is superfluous or a waste of time." *Walstad, supra,* 119 Wis.2d at 516, 351 N.W.2d at 485. The "reliability" of the expert's theory, test, or specialized experience is itself an issue for the trier of fact and not a precondition of admissibility. *State v. Peters*, 192 Wis.2d 674, 687, 534 N.W.2d 867, 872 (Ct. App. 1995). Simply put, there is no reasonable basis for alleging, much less concluding, that the relevancy-assistance standard has led triers of fact astray by permitting unfettered use of unhelpful expert testimony.

There are several bulwarks against "junk" or specious expertise. First, there is the adversary system itself:

> In a state such as Wisconsin, where substantially unlimited cross-examination is permitted, the underlying theory or principle on which admissibility is based can be attacked by cross-examination or by other types of impeachment. Whether a scientific witness whose testimony is relevant is believed is a question of credibility for the finder of fact, but it clearly is admissible.

Walstad, supra, 119 Wis.2d at 518-19, 351 N.W.2d at 487.

Nothing in this record points to any systemic failure by the trial bar to sift and winnow expert evidence capably and thoroughly. Second, case law recognizes that judges "serve a limited and indirect gatekeeping role" in reviewing expert evidence. *Peters, supra,* 192 Wis.2d at 688, 534 N.W.2d at 872. For example, trial judges may exclude or curtail expert evidence under the auspices of the balancing test set forth in Wis. Stat. § 904.03. Moreover, § 907.02 allows judges

to calibrate the flow of expertise depending on the needs of the particular case. Thus, experts may be permitted to lecture yet offer no opinions regarding the case. *See* Daniel D. Blinka, *Wisconsin Practice: Evidence* § 702.502 (2d ed. 2001).

Recently, several cases have reaffirmed *Walstad's* relevancy-assistance standard while emphasizing the importance of the expert's qualifications. *Martindale v. Ripp*, 2001 WI 113, 246 Wis.2d 67, 629 N.W.2d 698, ¶56; *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 1109, 245 Wis.2d 772, 629 N.W.2d 727, ¶¶ 90-95. Put differently, the ability of an expert to assist the trier of fact turns to a great extent upon his or her qualifications. Neither *Martindale* nor *Green*, cases decided in 2001, betrays any systemic flaws in Wisconsin's approach to expert testimony.

The certification by the Court of Appeals in this case seemingly suggests that Wisconsin law deprives trial judges of any controls over expert testimony, especially [w]here, as here, the parties do not dispute the expert's qualifications or the relevancy of the testimony[.]" Certification by the Court of Appeals, *supra,* p. 11. The certification posits a stark dichotomy between the "*Daubert* rule" and Wisconsin law, yet largely overlooks the "limited gatekeeping" role set forth in *Peters* and unduly depreciates *Martindale's* and *Green's* lesson that trial courts and trial lawyers must carefully assess an expert's qualifications. Indeed, perhaps part of the Court of Appeals' quandary arose because the parties (apparently) did not vigorously dispute the experts' "qualifications" or the

"relevancy" of the testimony. *Martindale* and *Green* teach the futility of labeling witnesses and the importance of closely assessing the expert's qualifications to provide assistance *with respect to each and every question asked.*

In sum, neither the certification by the Court of Appeals nor the parties' briefs document discernable problems or anomalies that warrant wholesale reconsideration of a standard that has worked well for several decades. The relevancy-assistance standard should be maintained.

III. SUBSTANTIVE CHANGES IN THE RULES GOVERNING THE ADMISSIBILITY OF EXPERT TESTIMONY SHOULD BE CONSIDERED THROUGH THE SUPREME COURT'S RULE-MAKING PROCESS.

Significant changes to the rules governing expert witnesses will have resounding effects that echo throughout the legal system. History and sound policy-making teach us that substantive changes in the Wisconsin Rules of Evidence are best accomplished through the rule-making process rather than case-law accretion.

Expert testimony is virtually ubiquitous in modern litigation. It is difficult to imagine a civil trial without some sort of expert witness. Commercial cases as well as personal injury litigation feature experts on liability, cause, and damages. Nor are experts confined to "high-stakes" litigation; even routine civil cases commonly involve experts on each side. *See* Blinka, *supra*, § 702.202 at 478 n. 13 (collecting cases). Lastly, one must also consider that experts' "specialized" knowledge embrace not only a mind-numbing array of subjects (e.g., medicine,

economics, business practices, and "stray voltage"), but arises through "experience" (skill) as well as formal education, thus compounding the challenges that face trial judges who must rule on the admissibility of evidence.

Criminal trials also regularly make use of expert evidence. Physicians, DNA analysts, and terminal ballistics specialists are commonly called to the stand in sexual assault and homicide cases. Nor is expertise in criminal cases restricted to the "hard" sciences. Psychologists and social workers regularly lecture juries on how sexual assault or physical abuse affects victims, defendants, and witnesses. *See* Blinka, *supra*, at § 702.202.

The point is not to provide an exhaustive catalogue of experts and the varying forms their testimony might take, but to emphasize the importance of carefully considering the effects of proposed rule changes throughout our legal system. When one contemplates the wide variety of civil and criminal litigation, the vast array of issues raised in these trials, and the myriad forms of expert testimony, one begins to understand the ripple effects of even seemingly mundane rule changes. And the complexities and added expense engendered by the federal rules on experts would induce changes of enormous magnitude.

The Supreme Court's rule-making procedures are the most appropriate avenue for assessing significant substantive changes and their disparate impact on civil and criminal litigation. The hearing process permits input by lawyers, judges, and other interested persons and groups. Such important decisions should not be confined to the parties' briefs on a narrow set of facts in just one

type of litigated case. History and experience bears this out.

The advantages of using the rule-making process are as evident today as they were nearly thirty years ago. The Wisconsin Rules of Evidence were created by the Supreme Court through its rule-making powers in 1974. *Wisconsin Rules of Evidence* 59 Wis.2d Rp. Although largely based on the (then) proposed Federal Rules of Evidence, the Wisconsin rules reflect alterations and additions based on practice and experience in our courts. For example, Wis. Stats. § 907.07 permits experts to read any part of a report that would be admissible if offered as oral testimony. The Federal Rules of Evidence have no analogous rule. Rather, Section 907.07 reflected "widespread practice" and drew from the Model Code of Evidence (not the federal rules). See 59 Wis.2d R219, Judicial Council Committee's Note, § 907.07. In short, the rule-making process permits consideration of an infinitely greater array of options based on a far-more complete assessment of their likely effect than case-by-case adjudication.

Indeed, the hazards of eschewing the rule-making process are vividly present in the checkered federal experience that is now contemplated. As enacted in 1975, Federal Rule of Evidence 702 was identical to present Wis. Stat. § 907.02. In 1993 the U.S. Supreme Court's decision in *Daubert* construed Rule 702 as mandating that judges perform a "gatekeeping" function in order to ensure that only "reliable" expert testimony was admitted. *Daubert, id.;* 509 U.S. at 590; 113 S.Ct. at 2795. *Daubert* failed, however, to put the federal courthouses in order. Splits soon arose among the circuits, some of which narrowly restricted

Daubert's reliability standard to "scientific experts." Suffice to say, distinguishing among scientific and "non-scientific" expertise created problems. In an effort to impose consistency and certainty (again) in federal evidence law, the Supreme Court's March 1999 decision in *Kumho Tire Co., Ltd. v. Carmichael,* 119 S. Ct. 1167, 1175, 526 U.S. 137, 149, 143 L.Ed.2d 238 (1999) asserted that *Daubert* applied to all species of expert testimony, regardless of whether the expert's specialized knowledge arose from education (e.g., "science") or from experience (e.g., the "skilled" expert). *Kumho Tire*, *id.,* 526 U.S. at 148; 119 S.Ct. at 1174.

Even while *Kumho Tire* was pending before the Court, the federal Advisory Committee on Evidence Rules (the "Advisory Committee") was contemplating substantive changes to the Federal Rules of Evidence. In May 1999, several months after the *Kumho Tire* decision, the Advisory Committee issued a report that recommended significant amendments to a variety of evidence rules, including [Federal] Rules 701, 702, and 703. *Report of the Advisory Committee on Evidence Rules, May 1, 1999* (Hon. Fern M. Smith, Chair, to Hon. Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure). The Advisory Committee based its recommendations on public comment by experienced lawyers, professional associations, and academics. In 2000 Federal Rules of Evidence 701, 702, and 703 were amended in accordance with the Advisory Committee's suggestions. See M. Graham, *Handbook of Federal Evidence* § 702.1 (5th ed.) (reproducing the Advisory

Committee's note on the 2000 amendments).

Thus, it is far from semantic quibbling to point out that the Court of Appeals' reference to the "*Daubert* rule" is something more than a misnomer. Certification by the Court of Appeals, *supra,* p. 11. Rather, the fence building begun by *Daubert* in 1993 has culminated in significant, complementary amendments to federal Rules 701, 702, and 703. In short, if Wisconsin contemplates following the federal model, the focus must be on the present Federal Rules of Evidence and the 2000 amendments. It is not simply a matter of adopting the "*Daubert* rule."

The merits of the present federal rules on expert testimony aside, the lesson learned is the advantage of using the rule-making process to collect and consider the wide array of information and viewpoints that bear on such change. The Wisconsin Judicial Council performed this role exceedingly well in the 1970s when this Court assessed the first generation of the federal rules. It would be the most appropriate forum for considering the wisdom of following the present federal rules on experts or some other variant. No fuse has been lit. There is no demonstration of compelling urgency that warrants precipitous change. Without doubt, Wisconsin lawyers, professional associations, judges, academics, and others will provide the information and insight essential to deciding whether the federal rules ought to be emulated.

CONCLUSION

Advocates of change in the evidentiary rules governing expert testimony bear the burden of demonstrating a compelling need for such change and the superiority of proposed new measures. Present Wisconsin law promotes the use of expert testimony that is helpful to the trier of fact in resolving factual disputes. In their role as "limited gatekeepers," Wisconsin judges have the power to exclude expert testimony when it is unhelpful or its probative value is substantially outweighed by other considerations. This relevancy-assistance standard has been used for nearly twenty years. Just last year *Martindale* and *Green* reaffirmed the rule while stressing the importance of closely scrutinizing experts' qualifications. Neither decision pointed to any fundamental flaws in the relevancy-assistance standard.

The Court of Appeals now asks this court to consider whether Wisconsin should abandon its long-standing rule. The reasons for such change are unclear and unsupported. The record is bereft of any widespread failures or breakdowns that suggest that the relevancy-assistance standard fails in its purpose to help the trier of fact while filtering specious or flawed expert testimony.

Should the court contemplate substantive changes in the rules governing experts, especially an adoption of the federal standard, the most appropriate avenue is the Court's rule-making procedures. Public hearings would permit the gathering of information regarding the need for such changes and its contours. Moreover, consistency and uniformity is facilitated greatly by amending,

creating, or deleting the Wisconsin Rules of Evidence themselves rather than relying on case law glosses of existing rules.

Respectfully submitted this 20 day of December, 2002.

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§ 809.19(8) CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that the foregoing Brief conforms to the rules contained in § 809.19(8) (b) and (c), Wis. Stats., for a Brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this Brief is 2,852 words.

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01-3128

COURT OF APPEALS OF WISCONSIN
DISTRICT II

Appeal No. 01-3128

CONLEY PUBLISHING GROUP, LTD.,
FREEMAN NEWSPAPERS LLC AND
LAKESHORE NEWSPAPERS, INC.,

Plaintiffs-Appellants,

v.

JOURNAL COMMUNICATIONS, INC. AND
JOURNAL SENTINEL, INC.,

Defendants-Respondents.

ON APPEAL FROM THE CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE DONALD HASSIN, PRESIDING
Case No. 00-CV-222

BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. On a motion by the defendant for summary judgment, was there a genuine issue of material fact as to whether the defendant had engaged in predatory pricing?

Answered by the Trial Court: No.

2. On a motion by the defendant for summary judgment, was there a genuine issue of material fact as to whether the defendant's challenged conduct had caused injury to the plaintiff?

Answered by the Trial Court: No.

3. Under Wisconsin law, must a plaintiff in a civil suit under Chapter 133, Wis. Stat., satisfy the requirements of the so-called "disaggregation" doctrine in order to avoid summary judgment?

Answered by the Trial Court: Yes.

Appellate review of summary judgment is de novo, i.e., the appellate court reapplies the same methodology applied by the trial court. In re Cherokee Park Plat, 113 Wis. 2d 112, 115-116, 334 N.W. 2d 580, 582 (Ct. App. 1983).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

While plaintiffs-appellants believe that the issues raised in this appeal can be adequately addressed by the parties' briefs, they are, of course, willing to offer oral argument if the Court deems it helpful to do so.

Because there is relatively little Wisconsin case law addressing issues arising out of litigation under Chapter 133, Wis. Stat., the plaintiffs-appellants believe that the Court's decision in this case should be published.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

I. The Parties.

A. The Waukesha Freeman and plaintiff-appellant Conley Publishing Group.

The Waukesha Freeman is a paid daily (Monday-Saturday) newspaper that has been an integral part of life in Waukesha County since 1859.[1] Founded with the support of Waukesha abolitionists, the Freeman first served as a weekly newspaper that spoke out against slavery in a city that served as an important stop on the Underground Railroad.[2] After a series of owners between 1859 and 1874, the Freeman was acquired by the Youmans family, who owned and operated the newspaper for the next 105 years. Under the Youmans family's leadership, the Freeman was named a finalist for the Pulitzer Prize for its investigations into Waukesha County law enforcement.[3] The paper also became the leader in the battle for public access to government records by suing the mayor of Waukesha for papers related to a police brutality investigation.[4] On the commercial

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[1] R.28: ¶12.
[2] R.28: ¶13.
[3] R.28: ¶15.
[4] R.28: ¶15. See, Youmans v. Owens, 28 Wis. 2d 672, 137 N.W. 2d 470 (1965).

side, the Freeman produced the first three-dimensional color newspaper advertisement.[5]

The Freeman remained in the Youmans family until 1979, when it was sold to the Des Moines Register & Tribune Company.[6] Thereafter, in 1983, the Freeman was sold to Thomson Publishing.[7] In May of 1997, Thomson sold the Freeman to its current owners, Conley Publishing.[8] Conley Publishing is the plaintiff and appellant in this case.

As the current owner of the Freeman, Conley Publishing, like its predecessors, has dedicated itself to providing thorough coverage of Waukesha County as well as state, national, and international news.[9] The Freeman continues to provide a unique voice in Waukesha County, as the only local newspaper published and edited exclusively within the county.[10] The Freeman does not publish a paid Sunday newspaper.[11]

The Freeman has had various homes within Waukesha since its first issue was published on March 29, 1859. Those homes have included an upstairs room of the Waukesha County bank building at the Five Points, as well as

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[5] R.28: ¶15.
[6] R.28: ¶16.
[7] R.28: ¶17.
[8] R.28: ¶18.
[9] R.28: ¶19.
[10] R.28: ¶20.
[11] R.28: ¶5.

locations on Grand Avenue, South Street, Park Place, and the Freeman's current location on Barstow Street.[12] Despite all these changes in the Freeman's location, one thing has remained constant: for nearly 150 years downtown Waukesha has been the Freeman's home, and the Freeman has been an important voice in the Waukesha community.

B. The Milwaukee Journal/Sentinel and Defendants Journal Communications, Inc. and Journal/Sentinel, Inc.

The Milwaukee Journal/Sentinel was formed as a result of the merger of Wisconsin's two largest newspapers, the Milwaukee Journal and the Milwaukee Sentinel, in April 1995.[13] The Journal/Sentinel ("Journal") publishes both a daily newspaper (Monday through Saturday) and a Sunday newspaper.[14] The Journal's daily newspaper is the only local paid daily newspaper in Milwaukee County.[15] In Waukesha County, the daily Journal has controlled roughly 78% of the readership market (subscriptions), versus a 22% share for its only competitor in Waukesha County, the Freeman.[16] Moreover, the Journal's Sunday newspaper is the

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[12] R.28: ¶21.
[13] R.28: ¶21.
[14] R.15: ¶2.
[15] R.27: Ex.B.
[16] R.17 (Report of Carl G. Degen).

only local paid Sunday newspaper in Milwaukee County, Waukesha County, Ozaukee County, and Washington County.[17]

II. The Journal's Efforts to Drive the Freeman Out of Business.

A. Beginning in 1996, the Journal launched, in its own words, "an aggressive campaign" against the Freeman.

As noted, the Journal has a monopoly in the local Sunday newspaper market in Waukesha County (and for that matter, in Milwaukee, Ozaukee, and Washington Counties). That outcome is consistent with the Journal's intent, as expressed by comments made in 1997 by Journal president Keith Spore, wherein Mr. Spore predicted that the Journal "will control the market."[18] Mr. Spore has also testified in this litigation that the Freeman is "destined to fail."[19] The Freeman is the Journal's only competitor in Waukesha County for local daily newspaper subscriptions.[20] If the Freeman fails, as Journal president Spore testified it would, the Journal's domination of the local paid newspaper market in the Milwaukee metropolitan area will be complete: It will have a monopoly on both daily and Sunday local papers in Milwaukee County, in Ozaukee county, in

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[17] R.27: Ex.C. (Deposition testimony of R. Schwartz: "There isn't a Sunday - another Sunday player out there.")
[18] R.27: Ex.H.
[19] R.27: Ex.H.
[20] R.27: Ex.A.

Washington County, and -- after 150 years -- in Waukesha County.

To accomplish its goal of complete market domination, the Journal in mid-1996 undertook a series of efforts to "convert Freeman subscribers to Journal subscribers," and thus to capture the 22% of the Waukesha daily newspaper market it did not already control. These efforts continued and intensified throughout 1997, during the Journal's "most aggressive campaign in Waukesha County since ... 1989."[21] As the Journal's 1997 Marketing Plan put it: "Efforts to strengthen our sales position in Waukesha County as well as the City of Waukesha will continue in 1997 as they began in fall of 1996."[22] Thus, beginning in 1996, the Journal was not simply targeting Waukesha, where it competed with the Freeman for daily newspaper readers. The Journal was also specifically targeting Freeman subscribers.

A Journal research analyst admits that no other geographic location in the State of Wisconsin was targeted as extensively as Waukesha was targeted in 1996 and 1997.[23] In fact, the campaign against the Freeman began in full force in the fall of 1996 when the Journal's research department instituted an information gathering campaign as

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[21] R.27: Ex.I. (Journal 1997 Marketing Plan, p. 10147.)
[22] R.27: Ex.I. (Journal 1997 Marketing Plan, p. 10139.)
[23] R.27: Ex.J.

part of "the Waukesha County strategic plan."[24] The stated goal of the Journal's research plan was to "identify the steps we need to undertake to switch readers/advertisers from the Freeman to the [Journal]."[25] At her deposition, Ms. Kriefall, the Journal research analyst in charge of developing the Waukesha County strategic plan, stated that in 1996 the Journal was engaging in specific attempts to convert Freeman subscribers and advertisers to the Journal.[26]

The Journal's own documents, particularly its marketing plans, detail how intensively the Journal targeted Waukesha County and Freeman subscribers beginning in 1996 and 1997. These documents discuss, among other things:

- the creation of the "Waukesha database"[27]
- the Journal Circulation Department's "Waukesha Focus" in 1996[28]
- the 1996 "Research Plan for Waukesha County"[29]
- the Journal Sales, Telemarketing, and Circulation Departments' "Waukesha Focus" for 1997[30]

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[24] R.27: Ex.K. (K. Gigowski (now K. Kriefall) memo to T. Pierce and S. Wysocki, pp. 13503-05).
[25] R.27: Ex.K at 13503.
[26] R.27: Ex.J.
[27] R.27: Ex.L. (Waukesha Database Requirements, 12/27/96, p. 27113-116.)
[28] R.27: Ex.M. (Waukesha Focus Documents, p. 13534-13537.)
[29] R.27: Ex.K (K. Gigowski (now K. Kriefall) memo, pp. 13503-13505).

- the meetings of the Journal's "Waukesha County task Force" in 1997[31]
- the "Waukesha Freeman Opportunity"[32]
- the "Waukesha County Effort"[33]

The Journal's efforts didn't stop there. According to the Journal's 1997 Marketing Plan, the Journal planned to "develop telemarketing scripts to gather Freeman subscriber information from prospects during sales conversations" and to "investigate further methods of collecting Freeman subscriber lists with [the Journal's] distribution and research staff."[34] The Journal also planned to offer a "former Freeman" discount to Freeman subscribers who switched to the Journal.[35]

B. The Journal's Sunday-daily "conversion" program made the Journal's daily newspaper -- which competes with the Freeman in Waukesha County -- available at no cost.

The Journal's primary weapon in its "aggressive campaign" to take subscribers away from the Freeman was its "Sunday - daily conversion program." This program, which

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[30] R.27: Ex.I (Journal 1997 Marketing Plan, pp. 10139, 10147, 10208-10210).
[31] R.27: Ex.N (memos to members of Task Force, pp. 20159-161, 20164-165).
[32] R.27: Ex.O (R. Tangle memo to L. Mueller, dated 9/25/96, pp. 13489-90).
[33] R.27: Ex.P (Troy Burke letter to Metro News Services, dated 1/16/97, pp. 6212-6213).
[34] R.27: Ex.I (Journal 1997 Marketing Plan, p. 10209).
[35] R.27: Ex.I (Journal 1997 Marketing Plan, p. 10210).

is the subject of this appeal, worked as follows. The Journal hired an outside marketing company to telephone residents of Waukesha County who subscribed to the Sunday Journal but not to the daily Journal.[36] The telemarketers offered the Sunday Journal subscribers a deal wherein the Sunday subscribers would also receive the daily Journal for the remainder of their Sunday contract at no additional out-of-pocket expense if they would slightly shorten their Sunday subscription terms.[37] For example, a 52-week Sunday-only subscriber could get 49 weeks of the daily Journal at no out-of-pocket cost by agreeing to shorten the Sunday subscription term by a mere three weeks.[38] In other words, for forfeiting three Sunday newspapers with a total retail value of approximately $4.50, the subscriber would receive 49 weeks (or 294 issues) of the daily newspaper with a total value of approximately $147.00. The Journal also offered a 13-week and a 26-week conversion program.[39]

For all intents and purposes, the Journal was giving away the daily paper in Waukesha. But the giveaway was not for a short period, such as a week or two, during which patrons could sample the daily Journal, but for months,

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[36] R.27: Ex.I (Journal 1997 Marketing Plan, p. 10154).
[37] R.27: Ex.Q (13-week telemarketing script, pp. 6203-05).
[38] R.27: Ex.R (52-week telemarketing script. P. 4503).
[39] R.14: ¶9 (Journal Brief in Support of Motion for Summary Judgment).

even up to a year. Laura Mueller (now Laura Engel) was the sales manager for the Journal's circulation department from 1994-1999[40]. In the fall of 1996, when the Journal began its assault in Waukesha County, Ms. Mueller was given a temporary new title: "Sales and Marketing Manager/Waukesha."[41] In her deposition, Ms. Mueller described how the Sunday-daily conversion program worked, and stated Sunday-only subscribers "don't pay an additional penny to get the daily."[42]

The Journal's 1997 Marketing Plan provides explicit details of the conversion program's role in the Journal's "[e]fforts to strengthen [its] sales position in Waukesha County as well as the City of Waukesha while converting Waukesha Freeman subscribers to Journal Sentinel subscribers ...."[43] The Journal's 1997 Marketing Plan states that the Journal planned to "target non-subscribers within [Waukesha] zip codes 53183, 53186, and 53188, which [would] include the majority of remaining Freeman subscribers."[44] In addition, the Journal's 1997 Marketing Plan states that the explicit goal of the Journal's "Waukesha Focus" was to "secure" 10,586 new daily

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[40] R.27: Ex. A (L. Engel Dep. p. 14-15).
[41] Id. at p. 15.
[42] Id. at pp. 43-44.
[43] R.27: Ex. I (Journal 1997 Marketing Plan, p. 10139).
[44] Id. (emphasis added).

subscribers in Waukesha County, "ultimately securing Freeman customers as Journal Sentinel subscribers."[45] Specifically the Journal's 1997 goal for "conversions" in Waukesha was 4,986 daily subscribers,[46] and it succeeded dramatically. According to its own documents, the Journal sold 12,750 13-week Sunday-daily conversions in Waukesha by November 19, 1997, exceeding the original goal by 256%.

The Journal's efforts to make inroads in the market for daily newspapers in Waukesha County were successful not only in absolute terms, but also in terms of the damage inflicted on its only competitor in that market, the Waukesha Freeman.

During the ten-year period leading up to 1996, the Freeman's circulation remained relatively constant, consistently hovering right around 22,000 subscribers.[47] At the beginning of 1996, the Freeman had 21,424 subscribers.[48] However, by the end of 1997, the Freeman's circulation stood at 17,466.[49] In other words, during a two-year period (1996-97) in which the Journal was offering its Sunday-only subscribers the chance to get the daily paper for 3 months,

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[45] Id. at p. 10147, 10208.
[46] Id. at p. 10154.
[47] R.28: ¶6.
[48] Id. at ¶7.
[49] Id at ¶8.

6 months, or a year without "pay[ing] an additional penny," the Waukesha Freeman lost nearly 20% of its subscribers.

The following year, 1998, was the only year between 1996 and 2000 in which the Journal did not employ its Sunday-daily conversion scheme in Waukesha County.[50] And for the only time in the 1996-2000 time frame, the Freeman actually gained subscribers in 1998.[51] In addition, for the only time in the 1996-2000 time frame, the Journal lost daily subscribers in Waukesha. As a result of temporarily suspending its Sunday-daily give-away program, by June of 1998 the Journal's "Waukesha [subscription levels were] under budgeted daily volume by 2,990 [subscriptions] and [were] 2,296 behind last year, [the approximated] number of upgrade starts that were budged to hit during April-June of [1998]."[52]

Following its setbacks in 1998 when it did not offer free subscriptions to the daily paper, the Journal re-instituted the Sunday-daily conversion scheme in Waukesha in 1999 and 2000.[53] During those years, the Freeman's circulation numbers again plummeted,[54] while the Journal's

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[50] R.27: Ex.B (Hoffman Dep. p. 55).
[51] R.28: ¶9.
[52] Id.
[53] R.27: Ex.U (Responses to Conley's Amended Third Set of Interrogatories, Interrogatory No. 4).
[54] R.28; ¶10-11.

daily circulation numbers increased.[55] In 1999, the Freeman lost another 1,500 subscribers.[56] At the time the trial court issue its decision dismissing the Freeman's claims, the paper had roughly 15,900 subscribers.[57] In other words, the Freeman lost fully 25% of its subscriber base over the period 1996-2000 during which the Journal had pursued its Sunday-daily conversion program.

C. The effect of the Journal's "aggressive campaign" was to send the Freeman into a "downward spiral."

In the newspaper business, it is common knowledge that a decline in circulation leads to a decline in advertising revenues and that a decline in advertisers leads to further declines in circulation. Eventually, this "downward spiral" ends in the affected newspaper going out of business. One of the Journal's own experts has clearly described the phenomenon in a study he did of newspaper consolidations in Detroit:

> Newspapers sell to two different customer groups: advertisers and readers. The demands of these customers are interdependent. Advertisers are willing to pay more for advertisements in a paper with larger circulation, and readers are more likely to want to read and be willing to pay for a paper with more local

[55] R.27: Ex.W (1999 Journal Weekly Circulation report, p. 5116; 2000 Journal Weekly Circulation Report, p. 5082).
[56] R.28: ¶10.
[57] R.28: ¶11.

> advertising, especially classified advertising. As a newspaper begins to decline, these demand interdependencies give rise to a phenomenon referred to as the "downward spiral." A decline in circulation reduces the demand of advertisers. The reduction in advertisers reduces the attractiveness of the paper to readers, which all else equal leads to a further reduction in circulation.[58]

The phenomenon of the downward spiral has also been recognized by the courts in newspaper antitrust cases.[59]

As the Freeman's circulation declined, its advertising revenue also declined. As a result of this decline in the Freeman's circulation and advertising revenue, Conley Publishing incurred net losses attributable to the Freeman of approximately $1,108,800 from the time it acquired the Freeman in May of 1997 until the dismissal of this action by the trial court.[60] The decline in circulation also reduced the Freeman's enterprise value by approximately $3.8 million.[61] The downward spiral also caused Conley to lay off 10% of its employees.[62] Without relief, the Freeman - an institution in Waukesha County for over 150 years -

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[58] Baseman, Kenneth C., "Partial Consolidation: The Detroit Newspaper Joint Operating Agreement" (1988).
[59] See, Community Publishers, Inc. v. Donrey Corp., 892 F.Supp. 1146, 1159 (W.D. Ark. 1995).
[60] R.26: ¶4.
[61] R.42 (Valuation of Waukesha County (WI) Freeman at p. 11).
[62] R.26: ¶6.

will be driven out of business.[63] The Journal, which already has a monopoly over the local daily newspaper in Milwaukee, Ozaukee, and Washington counties will have a monopoly in Waukesha County, as well.

D. This litigation.

In August of 2000, Conley Publishing filed its Second Amended Complaint against the Journal, alleging, among other things, that the Journal was monopolizing or attempting to monopolize the market for readership of paid daily newspapers in Waukesha County in violation of § 133.03, Wis. Stat.[64]

To show that a defendant has unlawfully monopolized or is attempting to monopolize a relevant market, a plaintiff must demonstrate, among other things, that the defendant has engaged in predatory or anticompetitive conduct.[65] One type of conduct that has traditionally satisfied this requirement is "predatory pricing."[66] The Freeman believes, and will argue below, that the evidence in the record creates a genuine issue of material fact as to whether the Journal's Sunday-daily conversion program constituted

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[63] R.26: ¶5.
[64] R.6: Count V.
[65] ABA Section of Antitrust Law, Antitrust Law Developments (4th ed. 1997) at p. 294 ("Predatory or anticompetitive conduct of the type required to support a monopolization claim is also required to establish an attempt claim.")
[66] See, e.g., Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117-18 (1986).

predatory pricing and thus satisfies the predatory/anti-competitive conduct element. The trial court, however, granted summary judgment dismissing the Freeman's claims, holding, among other things, that there was no genuine issue of material fact regarding predatory pricing. The trial court further held that, even if there were an issue of fact as to whether the Journal engaged in predatory pricing, summary judgment was still appropriate because (1) the Freeman cannot show the Journal's conduct caused its losses; and (2) the Freeman cannot adequately "disaggregate" its damages. In this appeal, the Freeman argues that the trial court erred in all three of those holdings.

ARGUMENT

I. The evidence in this case raises a genuine issue of material fact as to whether the Journal engaged in predatory pricing of daily newspapers in Waukesha County.

A. A predatory pricing claim has two elements: pricing below cost and the possibility of "recoupment."

Under the case law, two elements are required to support a claim of predatory pricing. In addition to showing that a defendant (like the Journal) has charged prices below a relevant measure of cost, a plaintiff must be able to show that the defendant would be able in the

future to raise its prices above the competitive level and thus "recoup" the losses incurred by pricing below cost.[67]

These two requirements are perfectly logical. There is a broad consensus among courts and commentators that the purpose of antitrust laws, such as §133.03 Wis. Stat., is to protect competition, not individual competitors.[68] Only when exclusionary practices threaten harm to the competitive process itself -- and thus threaten to harm consumers -- are such practices unlawful.[69] In the case of predatory pricing, it is a natural reaction to ask how charging extremely low prices (a price of zero, in this case) can possibly harm consumers. The two elements required in a predatory pricing claim address this question.

First, charging extremely low prices in the present -- even if it drives a competitor out of business -- will not harm consumers unless the conditions for recoupment are present, that is, unless the alleged predator will be able to raise prices above competitive levels in the future. It will be able to do so if the market in question is highly

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[67] Brooke Group, Ltd. v. Brown & Williamson Tobacco, 509 U.S. 209 (1993).

[68] See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977).

[69] See, e.g., Central Florida Enterprises, Inc. v. Federal Communications Commission, 683 F.2d 503, 507 n.20 (D.C. Cir. 1982) ("Our antitrust laws similarly dictate that competition -- and, thereby, consumers -- are to be protected rather than competitors.")

concentrated (only a handful of firms compete in it) and if there are barriers to entry that make it especially difficult for other firms to come into the market.[70] If, for example, only two firms serve a market, one firm can use predatory pricing to drive its rival out of the market and obtain a monopoly. If, in addition, there are barriers to entry, the predator, once it has a monopoly, can raise its prices without fear of new competitors entering. It can thus recoup any losses it incurred in its predatory pricing campaign, in the process harming consumers who must now pay monopoly prices.

The second element of a predatory pricing claim is that the challenged prices must be below "a relevant measure of cost.[71]" The idea here is that there are a variety of legitimate business strategies that involve cutting prices. Such pro-competitive price cutting should be encouraged. But when prices are set below certain measures of cost, the only plausible explanation is that the price cutter is not pursuing a legitimate, pro-competitive strategy but is engaged in predation. (Direct

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[70] See, e.g., Brooke Group v. Brown & Williamson Tobacco Group, 509 U.S. 209 at 226 (1993).
[71] Id. at 222.

evidence of a firm's predatory intent may also be relevant on this score.[72])

The Freeman's argument in this appeal is that there was more than enough evidence in the record to raise a genuine issue of material fact as to whether the Journal's Sunday-daily conversion program constituted predatory pricing. As a result, the trial court erred when it granted summary judgment dismissing the Freeman's predatory pricing claim.

One of the Freeman's experts was Dr. Frank Gollop, Professor of Economics and Director of Graduate Studies in Economics at Boston College. Dr. Gollop's curriculum vitae is included in Appellant's Appendix. Among other things, Professor Gollop earned his Ph.D. in economics at Harvard, has taught graduate level courses on industrial organization (the branch of economics that deals with antitrust issues), and has consulted on antitrust matters for the United States Department of Justice. Dr. Gollop's qualifications as an expert in this case have not been challenged.

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[72] For example, the United States Court of Appeals for the Eleventh Circuit has stated that the antitrust "statutes, their legislative histories, and common sense indicate that Congress intended for subjective evidence of a defendant's intent to be relevant." McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1500 (11th Cir. 1988), cert. denied, 490 U.S. 1084 (1989).

In his expert report and his deposition testimony, Dr. Gollop offered his opinion that both elements of a predatory pricing claim were present here.[73] Specifically, in its Sunday-daily conversion program the Journal was supplying daily papers for less than the relevant measure of cost. In addition, because of high barriers to entry into the daily newspaper market, once the Journal succeeds in driving the Freeman out of business, it will have a monopoly in the market for readership of daily newspapers in Waukesha County and be able to recoup.

The trial court rejected Dr. Gollop's expert analysis as unpersuasive, but in doing so the court usurped the role of the jury and committed reversible error.

B. There is a genuine issue of material fact regarding whether the Journal's Sunday-daily conversion program involved a price below the relevant measure of cost.

On the "below cost" element of the predatory pricing claim, here is what the trial court said:

> Professor Gollop's opinion concludes that on an individual cost basis that the Journal is arguably selling the newspaper for something less than it costs to produce it. What Professor Gollop's opinion does not include is an opinion as to whether or not or excuse me, that it fails to address the material issue of whether or not the total advertising revenue as folded

[73] R.17 (Report of Frank M. Gollop, Ph.D., at pp. 7-8).

> into the contracts - strike that. As folded into the price of the paper is below the cost to either the Journal or its competitor.
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> At this point this Court concludes that the opinion of Dr. Gollop is simply that the cost is no more than what's described as something less than the market price. There is no testimony by Dr. Gollop that this particular newspaper as sold by the Journal under this particular arrangement is anything less than the rival cost of the Waukesha Freeman.[74]

The trial court's position appears to be that even though the Journal was giving the daily paper to its Sunday subscribers (i.e., charging a price of $0), and even though as a matter of simple logic it must have cost something to produce those daily papers, the court can as a matter of law conclude there was no predatory pricing because the Freeman's expert did not somehow take advertising revenue into account, as the Journal and its expert believed he should have.

The most fundamental problem with the trial court's approach is that it presumes on a motion for summary judgment to weigh conflicting evidence. Professor Gollop did not "consider advertising" in his analysis of the Sunday-daily conversion program because in his expert opinion it was not necessary to do so. After all, the

[74] R.40 at p. 13-14.

Journal's own documents show that the incremental cost of supplying daily newspapers under the conversion program was far greater than any "price" the Journal extracted by shortening the term of the Sunday subscription.

Recall that the first element of a predatory pricing claim is that the predator has charged a price below a relevant measure of cost. The authorities generally agree that the appropriate measure of "cost" to use in a predatory pricing claim is "marginal" or "incremental" cost.[75] Marginal cost is defined as "the increment, or addition, to cost that results from producing one more unit of output."[76]

The Journal's own documents indicate that the incremental cost of making a daily newspaper available to a subscriber in Waukesha County is at least 35 cents.[77] That includes a paper and ink cost of 25 cents a copy and a delivery cost of 10 cents a copy, but it does not include the telemarketing costs of "converting" the subscriber. Based on these incremental costs and the fact that Journal subscribers "didn't pay a penny" for the daily paper, the

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[75] Phillip Areeda and Donald F. Turner, "Predatory Prices and Related Practices Under Section 2 of The Sherman Act," 88 Harv. L. Rev. 697, 733 (1975). (On the same page Areeda and Turner state that "The monopolist may not defend on the grounds that his price was 'promotional.'")

[76] Dennis W. Carlton and Jeffrey M. Perloff, Modern Industrial Organization 29 (2000).

[77] R.27: Ex. G (Journal 2000 Marketing Plan, p. 11984).

Journal's Sunday-daily conversion program constituted below-cost pricing. That is precisely the opinion Dr. Gollop offered.

Even though subscribers didn't pay a penny for the daily Journal under the conversion program, one might argue that the Journal received "revenue" because it shortened slightly the length of the Sunday subscription. For example, under the 52-week conversion program the Journal knocked three weeks off the Sunday subscription. But even if the Journal sold those three extra Sunday papers at the full newsstand price, the revenue received would be about $5.00, still far less than the $102.90 in marginal cost to supply 294 issues of the daily paper. Even for its shortest Sunday-daily conversion program, the Journal incurred $18.90 in marginal costs (6 papers per week x 9 weeks x $.35/paper) in return for (at a maximum) additional revenue of around $7.00 if the Journal sold the four extra Sunday papers to somebody else at full newsstand price.

Based on such evidence, Professor Gollop offered the opinion that the Journal's Sunday-daily conversion program was a clear case of pricing below cost, the first element in a claim of predatory pricing. The Journal's expert disagreed. The trial court apparently decided to accept that expert's opinion and to reject Professor Gollop's. We

respectfully submit that deciding which expert's opinion should be given credence is the jury's responsibility, not the court's on a motion for summary judgment.

Was Professor Gollop's opinion somehow fatally flawed, as the trial court apparently concluded, because he did not set off against the marginal cost of supplying daily papers the additional advertising revenue the Journal allegedly earned by picking up daily subscribers in Waukesha?

This was a motion for summary judgment. As such, the role of the trial court was not to determine the reliability of the parties' respective experts and the weight to be given to the evidence. This point was driven home a few years ago by the Minnesota Court of Appeals in a predatory pricing case brought under that state's antitrust statutes.[78] In that case, Prestressed Concrete, the plaintiff's former CEO offered calculations which purported to show that the defendants had charged less than their average cost on 19 pipe jobs. The defendants challenged the accuracy of the witness's method for identifying variable costs. Based in part on the defendants' critique, the trial court granted them summary judgment. This was error according to the court of appeals:

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[78] Prestressed Concrete, Inc. v. Bladholm Bros. Culvert Company, 498 N.W. 2d 274, 1993-1 Trade Cases ¶70, 187 (1993).

> This raises a genuine issue of material fact .... The [trial] court, however, improperly determined the credibility of [plaintiff's witness's] calculations and the weight to give to the evidence .... Accordingly, because there is a "legitimate dispute" about [plaintiff's] characterization of [defendant's] fixed and variable costs, we conclude the issue should be resolved by the fact finder.[79]

Likewise, there is a legitimate dispute here regarding whether it is appropriate in a predatory pricing case to look beyond the price the defendant actually charges. The Journal argues it is appropriate; the Freeman argues it is not. The issue should be resolved by the factfinder.

In presuming to pass judgment on Professor Gollop's expert opinion, the trial court effectively appointed itself "gatekeeper." While the federal courts, under Daubert,[80] have been instructed to play that role, Wisconsin has expressly rejected Daubert:

> Unlike in the federal system, where the trial court has a significant 'gatekeeper' function in keeping from the jury expert testimony that is not reliable ... the trial court's gatekeeper role in Wisconsin is extremely limited.[81]

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[79] Id. at 278.
[80] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).
[81] Green v. Smith & Nephew AHP, Inc., 2000 WI App. 192, ¶21, 238 Wis. 2d 477, 497, 617 N.W. 2d 881, 890.

In Wisconsin, "expert testimony is admissible if relevant and will be excluded only if the testimony is superfluous and a waste of time."[82] Moreover, "[o]nce the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment."[83]

C. There is a genuine issue of material fact regarding whether the Journal would be able to "recoup" once it drives the Freeman out of the market.

The trial court appears also to have concluded that -- as a matter of law -- the Freeman cannot satisfy the "recoupment" element of a predatory pricing claim:

> There is no showing by Dr. Gollop or any other witness in this record at this point that the Journal will at some future date be charging higher prices for its paper, and secondly, what the necessary amount it needs to recoup from its loss is or even that the Journal has or will suffer a loss as a result of the Sunday subscriber program.[84]

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[82] State v. Walstad, 119 Wis. 2d 483, 516, 351 N.W. 2d 469, 486 (1984).
[83] State v. Peters, 192 Wis. 2d 674, 690, 534 N.W. 2d 867, 873 (Ct. App. 1995). We understand that Daubert deals with the admissibility of expert evidence, an issue on which the trial court here did not rule. The fundamental issue is the same, however: what is the role of the judge and what is the role of the jury in dealing with expert evidence? Wisconsin's approach to these questions is as we have stated it.
[84] R.40 at p. 14.

Once again, the opinion of the Minnesota Court of Appeals in the Prestressed Concrete case is illuminating:

> [T]he [trial] court erred by concluding no genuine issues of material fact existed about whether [defendants] had a reasonable opportunity to recoup lost profits .... [Plaintiff's ex-CEO] testified that substantial investment was needed to enter the pipe market. [Plaintiff's] expert economist testified the pipe and bridge markets were controlled by four or fewer firms. [He] also alleged high plant and capital costs, well-entrenched firms, collusive behavior (including price fixing and bid rigging), and geographic market divisions created high barriers to entry into the pipe and girder markets. Viewed in the light most favorable to [plaintiff], this evidence raises genuine issues of material fact whether [defendants] had a reasonable expectation of recouping profits from their alleged predatory pricing.[85]

Likewise, the trial court in this case erred by concluding that no genuine issues of material fact existed about whether the Journal had a reasonable opportunity to recoup. Professor Gollop offered the opinion that Waukesha County is a "separate relevant economic market for daily paid newspaper subscriptions."[86] In that market there are at present only two competitors -- the Journal and the Freeman. The Freeman has roughly 22% of the market and the

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[85] Prestressed Concrete, Inc., v. Bladholm Bros. Culvert Company, 498 N.W. 2d 274, 279, 1993-1 Trade Cases ¶ 70, 189 (Minn. App. 1993)

[86] R.17 (Report of Frank M. Gollop, Ph.D., at p.3).

Journal has roughly 78%.[87] From this, it can readily be deduced that if the Journal succeeds in driving the Freeman out of the Waukesha County market, that market would be highly concentrated indeed: the Journal would have a monopoly, as it already does, in Milwaukee, Ozaukee and Washington counties.

The next question is whether barriers to entry would prevent other firms from entering the paid daily newspaper market in Waukesha County once the Journal has obtained a monopoly. Here is what Professor Gollop said:

> Significant barriers to entry confront any enterprise attempting to enter a paid-subscription daily or Sunday newspaper market. Significant scale economies exist both in the production and distribution of newspapers. Production is also characterized by high fixed costs. In addition, entry requires substantial capital requirements and the ability to withstand losses for significant periods of time as the entrant attempts to penetrate embedded subscriber and advertiser loyalty to the incumbent papers(s). Quite independent of the above list, an additional barrier arises because much of the expected entry costs are truly sunk - that is, they are irreversible and cannot be recovered through future action or sale. It is my opinion that entry barriers into both daily and Sunday newspaper markets are substantial.[88]

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[87] R. 17 (Report of Carl G. Degen).
[88] R. 17 (Report of Frank M. Gollop, Ph.D., at p. 5).

So, according to the evidence marshaled by the Freeman, once the Freeman is driven out of Waukesha, the Journal will have a monopoly. In addition, barriers to entry are substantial, and it is therefore unlikely other firms would enter. On that basis, we submit, a reasonable finder of fact could conclude that the Journal would have "a reasonable opportunity to recoup."[89] The Journal -- of course -- disagrees. But in the words of the Minnesota Court of Appeals in Prestressed Concrete, "this evidence raises genuine issues of material fact."[90] The trial court erred when it took it upon itself to weigh that evidence and to find for the moving party, the Journal.

II. The trial court's position on the causation issue usurps the role of the jury. It would also raise insurmountable barriers for plaintiffs under Chapter 133, directly contradicting Wisconsin policy as articulated by the statute and by the Wisconsin Supreme Court.

The trial court held that, even if there were a genuine issue of material fact as to whether the Journal engaged in predatory pricing, summary judgment dismissing the Freeman's claim is still appropriate because: (1) the Freeman cannot prove that the Journal's predatory conduct caused the Freeman's loss of subscribers; and (2) the

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[89] Prestressed Concrete, 498 N.W. 2d at 279.
[90] Id.

Freeman cannot adequately "disaggregate" its damages. We discuss the causation issue in this section and the disaggregation issue in Section III.

The trial court's position on causation amounts to this: A defendant in an antitrust case under Chapter 133 is entitled to summary judgment -- regardless of its unlawful conduct -- unless the plaintiff presents a damages analysis that does the impossible. If the trial court's decision is allowed to stand, an antitrust plaintiff in Wisconsin -- in order to survive summary judgment -- must either rule out, or else quantify precisely, every conceivable force in the universe that might have contributed in any way to the plaintiff's injury. Such an extremist view of the plaintiff's burden is inconsistent with Wisconsin law and policy.

The law in Wisconsin is that a defendant's unlawful conduct is a cause in fact of a claimant's loss if that conduct was a "substantial factor" in bringing about the loss.[91] The phrase "substantial factor" "denotes that the defendant's unlawful conduct had such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word

[91] Merco Distrib. Corp. v. Commercial Police Alarm, 84 Wis. 2d 455, 458-59, 267 N.W. 2d 652 (1978).

in the popular sense."[92] Whether in a particular case the defendant's unlawful conduct was a substantial factor in bringing about the harm is a question of fact.[93]

In Wills v. Regan, the Wisconsin Supreme Court stated:

> "[I]f the inferences to be drawn from the credible evidence are doubtful and uncertain, and there is any credible evidence which under any reasonable view will support or admit of an inference either for or against the claim or contention of any party, then the rule that the proper inference to be drawn therefrom is for the jury should be firmly adhered to and the court should not assume to answer such question...."[94]

The Wills court went on to say:

> Prosser, Law of Torts (2d ed.), p. 291, Sec. 50, states that "where reasonable men could not differ as to whether the defendant's conduct was, or was not, a substantial factor in producing the result, the determination of the question of causation is for the court; but in cases where reasonable men might differ -- which will include all but a few of the cases in which the issue is in dispute at all -- the question is one for the jury."[95]

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[92] Id.
[93] Id. at 459.
[94] Wills v. Regan 58 Wis. 2d 328, 339, 206 N.W. 2d 398 (1973), quoting from Weber v. Walters, 268 Wis. 2d 251, 255, 67 N.W. 2d 395, 397 (1954) (emphasis added).
[95] Wills v. Regan, 58 Wis. 2d 328, 340, 206 N.W. 2d 398, 405 (1975), quoting Jeffers v. Peoria-Rockford Bus. Co., 274 Wis. 594, 603, 80 N.W. 2d 785, 790 (1957).

That is the rule. And the evidence, as we have seen, is that from 1996-2000, a period during which the Journal pursued its Sunday-daily conversion giveaway, the Freeman lost 25% of its subscriber base. Might other causes have contributed to the Freeman's precipitous decline? The Freeman and the Journal disagree about that. But clearly this is a case "where reasonable men might differ," and consequently the question of causation is for the jury.

The trial court's position appears to be that the jury could not reasonably find the Journal's unlawful conduct to be a substantial factor in harming the Freeman unless the Freeman's own expert has either explicitly ruled out or else quantified all other conceivable contributing factors. We are unaware of any Wisconsin authority that imposes such an onerous -- indeed insurmountable-- burden on a plaintiff.

In fact, the leading Wisconsin case on the burden of proof in a case brought under Chapter 133 demonstrates that, if anything, the policy in Wisconsin has been to lighten the plaintiff's burden in such cases. In Carlson & Erickson Builders v. Lampert Yards, Inc.,[96] the Court of Appeals had held that the "middle burden" of proof should

[96] 190 Wis. 2d 650, 529 N.W. 2d 905 (1995).

apply in a civil action under Chapter 133. The Wisconsin Supreme Court reversed, holding that the less demanding "ordinary burden" was appropriate. Here is what the Wisconsin Supreme Court said in Carlson:

> The importance of the antitrust laws in preventing monopolies and encouraging competition, the fundamental economic policy of this state, is directly reflected in the statement of legislative intent in Sec. 133.01, Stats., and in the case law. The legislature commands in Sec. 133.01 that Ch. 133 be given the most liberal construction to achieve the aim of competition.[97]
>
> The Wisconsin legislature determined that private, civil antitrust suits are important methods of enforcing Ch. 133. To encourage private enforcement the legislature built incentives into the statute. These include tolling the statute of limitations under certain circumstances, allowing the cost of suit, including reasonable attorney fees, to prevailing claimants, awarding treble damages, and granting expedited treatment to civil antitrust actions in the courts. Under this legislative scheme, a private party 'performs the office of a private attorney general' when bringing a civil antitrust action and significantly supplements the government's limited resources for enforcing antitrust law.[98]
>
> Thus, there is a 'longstanding policy of encouraging rigorous private

[97] Carlson & Erickson at 662. (emphasis added).
[98] Carlson & Erickson at 663.

> enforcement of antitrust laws.' We must construe and apply the antitrust laws with the important role of private actions in mind. The court assumes that the legislature intended an interpretation that advances, not hinders, this purpose of the statute.[99]

In the face of this clearly articulated policy, and in the face of a traditional procedural rule that where reasonable men might differ as to the cause of a plaintiff's injury the question is for the jury, the trial court in this case granted summary judgment for the Journal, stating "this Court is wholly without a factual basis by way of this record as to the causation issue."[100]

But we have reviewed the undisputed facts in detail above. The most salient are these:

- In the 10-year period leading up to 1996, the Freeman's circulation had been relatively constant, consistently hovering around 22,000 subscribers.
- In 1996, the Journal, which already had a monopoly on Sunday newspapers in Waukesha County and a dominant share of the daily newspaper market, launched an "aggressive campaign" "to switch readers/advertisers from the Freeman."
- As part of its self-described "aggressive campaign" the Journal launched its Sunday-daily

[99] Carlson & Erickson at 674.
[100] R.40 at 20.

conversion program. Under that program, the Journal offered Sunday-only subscribers the daily Journal for 3 months, 6 months, and even a year at no out-of-pocket cost to the subscriber.

- Over the 1996-2000 period during which the Journal pursued its Sunday-daily conversion giveaway, the Freeman lost 25% of its subscriber base.
- In 1998, the only year between 1996 and 2000 when the Journal did not employ its predatory conversion program, the Freeman gained subscribers.

And yet the trial court concluded it was "wholly without a factual basis by way of this record as to the causation issue," and on that basis granted summary judgment for the Journal.

The trial court apparently believed that the evidence adduced by the Freeman established only a "mere possibility" of causation and that the matter remained "one of pure speculation or conjecture." Apparently, for a plaintiff under Chapter 133 to get beyond "pure speculation or conjecture" he must disprove all other possible explanations besides the defendant's unlawful conduct

> [I]n no way, shape, fashion or form has anyone come forward on behalf of [The Freeman] to describe the market

> conditions, the management styles, the programs that were offered ....[101]

Once again, we say, a plaintiff under Chapter 133 has no such burden in order to survive summary judgment on "causation." According to Prosser:

> The plaintiff need not negative entirely the possibility that the defendant's conduct was not a cause, and it is enough to introduce evidence from which reasonable persons may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no one can say with mathematical certainty what would have occurred if the defendant had acted otherwise. Proof of what we call the relation of cause and effect, that of necessary antecedent and inevitable consequence, can be nothing more than "the projection of our habit of expecting certain consequents to follow merely because we had observed these sequences on previous occasions." If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists.[102]

The operative question is this: As a matter of ordinary experience would the fact that one firm (the

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[101] R.40 at 21.

[102] Prosser and Keeton on Torts, 5th Ed. (Hornbook Series) §41, pp. 269-70. (Footnotes omitted.) (Emphasis added.)

Journal) gave away a product that another firm (the Freeman) was selling, be expected under the circumstances to produce a decline (indeed a precipitous decline) in the second firm's business? The answer is obvious. And because the result, a decline in the Freeman's subscriber base, did in fact follow, the conclusion is permissible that the causal relation exists. The trial court was manifestly in error when it granted summary judgment for the Journal on the causation issue. The question is for the jury. The Journal may -- at trial -- attempt to persuade the jury that factors other than its predatory conduct were responsible for the Freeman's injury.

III. The "dissaggregation" doctrine as applied by the trial court is inconsistent with Wisconsin law and policy.

The trial court also relied on the so-called "disaggregation" doctrine in granting summary judgment for the Journal.[103] This doctrine was developed by the Second Circuit in Berkey Photo, Inc. v. Eastman Kodak Co.[104] In its most extreme form the doctrine requires the plaintiff to offer evidence as to what portion of its injury was caused by the defendant's unlawful conduct and what portion was caused by other factors. The doctrine has not been embraced by all the federal circuits; the Third Circuit,

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[103] R.40 at pp. 17-19.
[104] 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

for example, implicitly rejected it in Bonjorno v. Kaiser Aluminum & Chem. Corp.[105] One commentator has argued that "[t]he disaggregation requirement suffers from two conceptual defects, each a separate ground for rejecting the rule."[106]

One of those defects is that "the [disaggregation] rule would virtually eliminate all potential plaintiffs in monopolization actions."[107] In that regard, the trial court's application of the doctrine was error for the same reason its approach to causation was error. It flies in the face of well-established Wisconsin law and clearly articulated Wisconsin policy by raising insurmountable barriers for private antitrust plaintiffs.

Wisconsin courts look to federal antitrust decisions for guidance when (1) the language and policy of the federal and state antitrust statutes are substantially similar; and (2) Wisconsin case law on an issue is "scarce."[108] Admittedly, Wisconsin case law regarding the substantive elements of a predatory pricing claim (pricing below cost and recoupment, discussed earlier) is relatively

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[105] 752 F.2d 802 (3d Cir. 1984), cert. denied, 106 S.Ct. 3284 (1986).
[106] James R. McCall, The Disaggregation of Damages Requirement in Private Monopolization Actions, 62 Notre Dame L.Rev. 643, 668 (1987).
[107] Id.
[108] See Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc., 190 Wis.2d 650, 665, 529 N.W.2d 905, 911 (1995).

scarce. However, that is not true of Wisconsin case law regarding causation, which is extremely well-developed. The trial court's reliance on the federal "disaggregation" concept of causation was not only unnecessary but it flies squarely in the face of that well-developed Wisconsin law.

In Wisconsin, a plaintiff proves causation if it shows that the defendant's conduct was "a substantial factor" in causing an injury. As the Court of Appeals stated in the Reiman case:

> In all cases involving problems of causation and responsibility for harm, a good many factors may have united in producing the result; the plaintiff's total injury may have been the result of many factors in addition to the defendant's tort or breach of contract. Must the defendant pay damages equivalent to the total harm suffered? Generally the answer is Yes, even though there were contributing factors other than his own conduct. Must the plaintiff show the proportionate part played by the defendant's breach of contract among all the contributing factors causing the injury, and must his loss be segregated proportionately? To these questions the answer is generally No. In order to establish liability the plaintiff must show that the defendant's breach was "a substantial factor" in causing the injury. (citation omitted).[109]

[109] Reiman Assoc., Inc. v. R/A Advertising, Inc., 102 Wis.2d 305, 321, 306 N.W.2d 292, 301 (Ct. App. 1981)(emphasis added).

In other words, Wisconsin law on causation does not require the Freeman to "segregate proportionately" (i.e. "disaggregate") its damages. Under Wisconsin law, the Freeman is not required to separate out the injuries caused by the Journal's anti-competitive subscription scheme as opposed to injury resulting from alternative causes. So long as the Journal's conduct is a cause of the Freeman's injury -- a "substantial factor" in that injury --the Journal is liable for the total harm suffered.

Moreover, the application of Wisconsin's causation standard (as opposed to the draconian, monopolist-friendly "disaggregation" concept applied by some federal courts and our trial court), is supported by the underlying purpose of Chapter 133 and the legislature's intent in enacting Chapter 133. As the Wisconsin Supreme Court stated in the Carlson case, the legislature commands in §133 that the statute be given "the most liberal construction to achieve the aim of competition."[110] In addition, Wisconsin has a "longstanding policy of encouraging rigorous private enforcement of antitrust laws."[111] In this case, the trial court required the Freeman, an antitrust plaintiff under Wisconsin's Chapter 133, to meet an insurmountable federal

[110] Carlson & Erickson, 190 Wis.2d at 662, 529 N.W.2d at 909.
[111] Id. at 663.

causation burden which is contrary to the clear dictates of Wisconsin law.

The Freeman's position is simple: It lost subscribers during the period of 1996-2000 because the Journal engaged in predatory pricing. Indeed, one of the Freeman's experts, economist Carl Degen, calculated that, after factoring in population growth in Waukesha County and a general decline in newspaper readership everywhere, the Freeman should have had 21,184 subscribers at the end of the period.[112] It in fact had 16,319.[113] It suffered hundreds of thousands of dollars in out of pocket losses and a multimillion dollar decline in its value as a business.[114] The Journal believes that some of the Freeman's injury was due to other factors. It is entitled to that opinion and is welcome to try to persuade the jury that the Freeman suffered from incompetent management, bad luck, etc. But unless it is crystal clear on the summary judgment record that no reasonable jury could find the Journal's conduct to be a substantial factor in the Freeman's injury, the trial court erred when it invoked the "disaggregation" doctrine to dismiss the Freeman's claim.

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[112] R:17 (Report of Carl G. Degen).
[113] Id.
[114] R.42 (Valuation of Waukesha County (WI) Freeman at p. 11).

CONCLUSION

For the foregoing reasons, the trial court erred when it held that there was no genuine issue of material fact as to whether the Journal engaged in predatory pricing; when it held that there was no genuine issue of material fact as to whether the Journal's conduct injured the Waukesha Freeman; and when it held that a plaintiff under Chapter 133 must satisfy the "disaggregation" doctrine in order to avoid summary judgment. This Court should reverse the trial court on these issues and remand the case for trial on the merits.

Dated this 8th day of March, 2002.

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CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced using a monospaced font. The length of this brief is 41 pages.

Dated this 8th day of March, 2002.

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APPENDIX OF PLAINTIFFS-APPELLANTS

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STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

CONLEY PUBLISHING GROUP LTD., FREEMAN NEWSPAPERS LLC, and LAKESHORE NEWSPAPERS, INC.

Plaintiffs,

JOURNAL COMMUNICATIONS, INC., and JOURNAL SENTINEL INC.

Defendants.

Case No. 00-CV-222
Honorable Donald Hassin

ORDER FOR DISMISSAL AND JUDGMENT AND JUDGMENT

ORDER FOR DISMISSAL AND JUDGMENT

Defendants moved the Court, pursuant to § 802.08, Stats., for summary judgment dismissing all counts. The Court heard the motions on August 3, 2001, and decided the motions on October 2, 2001. Plaintiffs appeared by W. Stuart Parsons, Brian D. Winters (August 3, 2001 only) and David R. Olson (October 2, 2001 only). Defendants appeared by John R. Dawson and Michael D. Fischer.

For the reasons stated by the Court in its oral decision of October 2, 2001, which are incorporated herein by reference,

IT IS ORDERED:

1. Defendants' motions for summary judgment are granted in their entirety.

2. Plaintiffs' action is dismissed, on the merits, with prejudice.

Dated this 12th day of October, 2001.

BY THE COURT:

s/ Donald J. Hassin Jr

Honorable Donald Hassin
Circuit Court Judge

JUDGMENT

Based on the Court's Order for Dismissal and Judgment dated October 12 2001:

IT IS ADJUDGED that the claims of plaintiffs Conley Publishing Group Ltd., Freeman Newspapers LLC, and Lakeshore Newspaper, Inc., against defendants Journal Communications, Inc. and Journal Sentinel Inc. are dismissed, on the merits, with prejudice.

Dated this 12 day of October, 2001.

BY THE COURT:

Carolyn T Iverson
By Susan Van Abel
Deputy

State of Wisconsin : Circuit Court : Waukesha County

CONLEY PUBLISHING GROUP LTD., et al.,

Plaintiff,

-VS-

Case No. 00-CV-000222

JOURNAL COMMUNICATIONS,

Defendant.

October 2, 2001

Honorable Donald J. Hassin, Jr.

Circuit Judge, presiding

ORAL RULING

APPEARANCES:

STUART PARSONS and DAVID PAULSON, Attorneys at Law, appeared on behalf of the Plaintiff.

JOHN R. DAWSON and MICHAEL FISCHER, Attorneys at Law, appeared on behalf of the Defendant.

Lori J. Boyer, Official Reporter

TRANSCRIPT OF PROCEEDINGS

THE COURT: In the matter of Conley v. the Journal and with the consent of the parties, we'll go ahead and get started.

Firstly, appearing on behalf of the Plaintiff, Mr. Stuart Parsons and David Paulson.

My continuing apologies for our disastrous ceiling tile the last time you were here, Mr. Parsons. You've noted it was replaced. I would also note for the record, candidly, despite the potential injury involved, that the tile incident did serve as a catalyst for the County Board releasing some monies for fixing the ceiling in the courtroom. Well served.

On behalf of the Journal, gentlemen.

MR. DAWSON: John Dawson, Michael Fischer.

THE COURT: Thank you, Mr. Dawson. I appreciate your appearance, as well.

This is a matter before the Court this morning for purposes of a decision regarding a motion for summary judgment brought on by the Defendant, Journal Company, to dismiss all claims for want of a material issue and fact.

Matter was argued in August. As a result of that appearance, the Court did solicit additional input concerning the – an understanding of the concept of a monopoly leverage. The Court did receive contemporaneous submissions from the parties and they were reciprocally delivered.

A matter that came as a result of that was as a part of the submission, by the Conley Publishing, there was an affidavit that was attached thereto and it's from a Mr. Ciccantelli and then there was a letter in response to that submission by the Journal objecting to the submission inasmuch as the cut off for submissions in support of the position of the Conley Publishing was due by June the 8th.

There was no effort to seek an enlargement of that time from the Court nor was one somehow granted for any reason and there were other objections to the content of the document inasmuch as portions of it may well not be admissible at trial.

So it's not in proper affidavit format and if I might surmise, simply unfair at this point to have submitted that particularly where the Court solicited no such input. Fairly stated, Mr. Dawson?

MR. DAWSON: Yes, Your Honor.

THE COURT: Any comment you want to make regarding that, Mr. Parsons?

MR. PARSONS: No comment.

THE COURT: For the reasons I've stated, firstly, that the affidavit was untimely all such documents in support of the Plaintiff's position were due by June the 8th. that no exception to that order was sought from the Court. You gentlemen worked your own schedule to a large degree and to be commended for that concerning the discovery in this matter in preparation for the motion.

Thirdly, that it was filed without permission. It was -- Large portions of the document itself, the Court having reviewed it, contain what I would determine inadmissible hearsay and statements made without sufficient foundation in light of the circumstances as they're described by the affiant regarding his own knowledge.

Finally, that it's unfair, discusses issues that were not solicited by the Court and there is no opportunity for the Journal to respond to it.

For all those reasons, I'll disregard it in terms of the Court's decision here today.

Other than that issue, and obviously the Court's decision respecting the interest of the parties, is there anything else we need to address immediately or for any other purpose, Mr. Dawson?

MR. DAWSON: Not from the defense side, Your Honor.

THE COURT: Thank you. Mr. Parsons?

MR. PARSONS: No, sir.

THE COURT: All right. Thanks very much. Then, gentlemen, and thank you for all your cooperation with the Court in an effort to enlighten the Court concerning the matters that are brought to bear here today.

This is, as I described, a motion for summary judgment. It is the position of the – or excuse me, the position of the or the state of the law that claims should be dismissed as a matter of law if there are no genuine disputes of material facts which could support a theory of recovery by the Plaintiff.

Any factual issues that survive such a motion must be of such a nature that a reasonable juror could return a verdict for the non-moving party.

In other words, there must be a material issue of fact before this Court is in a position to permit the matter to proceed to trial.

The Plaintiff has advanced five causes of action. The first of which claims that the actions of the Journal respecting certain discounts solicited to the, its Sunday customers, were secret discounts within the meaning of the statute.

Let me offer these thoughts concerning the facts in this case as they bear on that particular issue.

First, there is no dispute that the Milwaukee Journal during a period of time relevant to these proceedings perhaps as early as 1988, engaged in a Sunday daily conversion plan. This plan was offered only to Sunday subscribers and the gist of the plan was this. There being a Sunday subscriber, a solicitation was made by way of the telephone to convert that plan to a shortened number of Sundays for the subscription in exchange for which the Journal would thereafter provide daily as well as Sunday service.

In other words, programs for such as a period of subscription for 13 weeks would be shortened to nine weeks in exchange for which the recipient of the subscription would receive the daily paper for that entire period of time to include the Sunday only delivery.

The average period of these programs shortened the overall subscription three or four weeks. There was no additional charge

made for these conversions. In other words, if the subscriber had paid "X" amount of dollars for the Sunday subscription in exchange for a shortened period of Sunday subscription he or she would receive the daily paper and as well not be required to pay any additional cost.

These subscriptions or these offers by the Milwaukee Journal attenuated the entire eleven county Southeast Wisconsin area and that at times material to this complaint, phone calls were made somewhere between the numbers of 50,000 to 68,000 annually in solicitation of this program.

That is 50 to 68,000 subscribers were contacted and asked whether or not they wished to convert to the program.

It is uncontested that throughout this period of time the Milwaukee Journal by way of this conversion program was offering service at a 50 percent or greater published rate. That is the cost of those papers going out was in my opinion of the Milwaukee Journal at something more than 50 or more percent of the publish rates and that is undisputed.

The Freeman, that is, the Conley Publishing Company in its present state, but the Waukesha Freeman through its prior ownership, became aware of the program perhaps as early as 1992.

Certainly information was sent acknowledging the program to the Freeman as early as 1996 and the – this 50 percent cost below daily subscription rate is not a unique program.

In fact, as to that rate of cost, the Freeman itself has similar programs as do innumerable daily papers throughout the United States. In order, under Section 133.05 for such a program, that is the discounted subscription rate to pass muster, it must be one, a secret and secondly, an unearned discount.

The leading case in Wisconsin obviously is Jauquet Lumber v. Kolbe & Kolbe Millwork, 164 Wis.2d 689, which is -- The Court's attention is directed by both sides to that matter. That is at page 689 if I overlooked that, in which the Court of Appeals, I believe the Fourth District of this State, determined that secret is given its common meaning within the statute because it's not described otherwise.

That is something that is kept from the knowledge or view, concealed or hidden. In the facts as they are argued here, there is no case to support the contention in my estimation, that a solicitation of between 50 to 68,000 people annually is a secret.

It is hard to imagine in a common sense environment that such a subscription opportunity is in fact a secret where any number of households are contacted on an annual basis.

It's also not a secret in my estimation because the Freeman became aware as early as 1992, perhaps 1996, at the latest, by uncontroverted evidence that in fact such a program was on going.

Furthermore, it is interesting to note that apparently any number of persons employed by the Waukesha Freeman were in fact solicited for such a program assumedly because they were Sunday subscribers to the Sunday Journal.

Jauquet talks about these types of matters being secret within the meaning of Chapter 133 where there is no effort to affirmatively publicize and while under some – some circumstances may be an affirmation as to the existence of such a program.

This Court concludes that the facts in this case do not support arguably any absence of publication or wide dissemination speaks for itself. There are no facts to support any misrepresentation as to the existence of such a program by the Journal, and, therefore, this Court concludes as a matter of law that this program was not a secret.

The Plaintiff in such matters is also required to prove in addition to being secret, that the discount was unearned. What is overlooked in such argument is there is no free opportunity here for any subscriber. That, in fact, in exchange for a shortened program of subscription, additional newspapers are provided. There is no argument that in fact such actions were done to anything other than the 50 percent publish rate that I alluded to earlier and in fact as I indicated, that the Freeman actually sells its newspapers at a similar rate.

So in such circumstances, the Court cannot conclude as a matter of law that the discount itself was unearned as well. Therefore, the undisputed material facts as to Count 1 favor the Defendant overwhelmingly and the Court will grant summary judgment dismissing Count 1.

Counts 2 and 3 deal with the stand-alone cause of action of monopoly leverage.

The argument by Conley is that no monopoly leveraging is a stand-alone cause of action as a result of cases stemming from the Second District Court of Appeals in the Federal system.

In order to succeed on a claim for monopoly leveraging, a party must first possess monopoly power in one market.

Secondly, use that power to gain a competitive advantage in another market and three, cause injury by such anticompetitive conduct.

Under the theory of Berkey v. Kodak, there is support for the argument that there need be no showing of any attempt to monopolize or an actual monopoly to occur in order to prevail and, therefore, no monopoly leveraging is in an esoteric sense considered to be an available cause of action.

Since Berkey, however, I'm not aware of any cases that support the contention and that in fact the overwhelming case law as additionally supported in Spectrum Sports recognizes in essence monopoly leveraging is a means by which attempt to monopolize or monopolization might occur, but that is in Spectrum Sports the Supreme Court spoke, it makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so.

In other words, under the Berkey theory, monopoly leveraging can occur with no intent to monopolize in the second market as described under the case law and I believe that particular approach to the cause of action has been overwhelmingly rejected, firstly, by the majority of Courts of Appeals as well as the Supreme Court in Spectrum.

In fact, as recently as the Virgin decision this past summer at Virgin Atlantic v. British Airways, this case decided in July of this year, 257 Fed.3rd, 256, the author of that decision out of the Second District, recognizing the Berkey case, also concludes further that as under an ordinary diagnostic system there must additionally be a showing not only of the attempt to monopolize or dangerously threaten to do so but that the claim for monopoly leveraging requires a showing of both propriety of or anticompetitive conduct.

I'm satisfied that monopoly leveraging by way of a means to an end may be demonstrated but as a stand-alone cause of action does not exist either in Wisconsin or under the present state of the Federal case law and for those reasons alone, I'll dismiss Counts 2 and 3 as failing to state a cause of action upon which relief can be granted.

Now, that takes us to Counts 4 and 5 of the complaint which by way of their writing ascribed to all other provisions of the complaint and understandably so Count 4 is a contract alleging the contract in the string of trade.

In Count 5 it alleges attempt to monopolize or in fact to monopolize.

Under either this Court need, in my opinion, address the elements of either predatory pricing or anticompetitive contract behavior by the Journal which requires that the Plaintiff prove that prices complained of are at or below an appropriate measure of its rival's costs actually are below the rival's cost and secondly, that a dangerous probability of the Journal in this case the Journal or any Defendant of recouping its investment can be low cost pricing.

Now, what has been demonstrated by way of the record at this point in time concerning the issue of predatory pricing.

The position of the experts by the Journal is understandable. What is key is the positions adopted by the experts provided by the defense presently or not the defense but in the case of Conley, the non-moving party principally Professor Gollop's deposition.

Professor Gollop's opinion concludes that on an individual cost basis that the Journal is arguably selling the newspaper for something less than it costs to produce it. What Professor Gollop's opinion does not include is an opinion as to whether or not or excuse me, that it fails to address the material issue of whether or not the total advertising revenue as folded into the contracts – strike that. As folded

into the price of the paper is below the cost to either the Journal or its competitor.

At this point this Court concludes that the opinion of Dr. Gollop is simply that the cost is no more than what's described as something less than the market price. There is no testimony by Dr. Gollop that this particular newspaper as sold by the Journal under this particular arrangement is anything less than the rival cost of the Waukesha Freeman.

Secondly, Dr. Gollop should be required to offer the record some probability as to what the costs of the Journal are respecting its investment in this below cost pricing.

The record is silent respecting any such testimony. There is no showing by Dr. Gollop or any other witness in this record at this point that the Journal will at some future date be charging higher prices for its paper, and secondly, what the necessary amount it needs to recoup from its loss is or even that the Journal has or will suffer a loss as a result of the Sunday subscriber program.

Therefore, this Court concludes that there are no facts to support a predatory pricing circumstance that is alleged.

Respecting the advertising matters there is a program of advertising which is alleged to be in violation of the antitrust laws that concerns first dollar discounts. And it is the argument of the Conley Publishing that such dollar discounts were extrusionary as much as this prohibited large volume advertisers from advertising with the Waukesha Freeman.

The substance of these programs is as follows: That one buys "X" lines of advertising for a fixed amount of money. If one exceeds a certain number of lines of advertising during the course of the contract, then the next line and all lines preceding that line of advertising are at a reduced rate.

It is the argument of Dr. Gollop that in fact this particular pricing scheme does two things.

Firstly, it provides for free advertising for those lines that make up the difference after you cross the threshold and secondly, that it requires advertisers to continue to place their money with the Journal, and, therefore, precludes them from advertising in the Freeman.

What has not been offered on this record concerning this particular issue, is any testimony from any advertisers that they were

so induced. Presumably, if there was such information, it would have been made available.

Again, no one has come forward at this stage in the proceeding and said in effect that I was required to continue to advertise with the Milwaukee Journal because of the price methodology by which I contracted.

In addition, there is no credible testimony on this record that would be admissible at trial to suggest that the contracts themselves are somehow violative of the antitrust laws.

There is no showing anywhere that such contracts are being done at below cost and in fact that the proper, at least a proper mechanism by which to evaluate these contracts, is the overall cost of the lines provided as compared to the cost of the contract itself.

But we -- Dr. Gollop seems to ignore that approach nor does he approach the matter from the overall revenues that perhaps could be folded in to consider this form of advertising as another methodology.

He simply illustrates on that particular instance of particular free lines that we discussed and offers no support for that argument.

There is no support offered by that argument by Conley to suggest that any one or more of large volume advertising in fact has been discouraged from advertising with the Freeman as a result of that.

Furthermore, Dr. Gollop concludes in his deposition that these large volume advertisers would not – it would not make sense for them to advertise in the Milwaukee or excuse me, in the Waukesha Freeman because of the numbers of dollars involved, the numbers of individuals that are sought to be contacted, that the Freeman really is not a competitor for such advertising dollars.

It's hard to imagine how a claim for such anticompetitive conduct where the Freeman is not in a position to compete could survive.

Finally, there is the matter of the proof of damages as concerns all five causes of action in this matter.

There are, in Dr. Gollop's deposition, no statements whatsoever -- Well, let me back up for just a moment in that regard.

We're talking about the desegregation of damages here and what needs be shown by Conley to survive a motion for summary judgment.

It is the argument of Conley that in fact because their damage expert has indicated a significant loss of revenue as a result of lost subscriptions and lost advertising dollars that in fact this is as a result of the Milwaukee Journal's anticompetitive conduct.

In MCI v. ATT, which is a case cited I believe by the Journal in one of its briefs, I'll read in pertinent parts from the decision of the causation of damage question in that case.

"Plaintiffs must prove antitrust injury which is to say injury of a type that antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Once causation of damages has been established, the amount of damages may be determined by just and reasonable estimation as long as the jury verdict is not the product of speculation or guesswork.

Since the Supreme Court has been willing to accept," and this talks about the United States Supreme Court, "to accept a degree of uncertainty in the calculation of damages, strict proof of damages having been caused by which acts is not required."

This Court's reading of that is there are illegal acts taking place under the antitrust laws that – that the complaining party

need not come forward and individualize as to which acts caused which specific damages.

However, it is essential, however, that the damages reflect only the losses directly attributable to unlawful competition. It continues, "When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principal estimate of the amount of damage.

This is precisely the type of speculation or guesswork not permitted for antitrust jury verdicts. There is nothing inconsistent between requiring proof that damages were caused by illegal acts and the rule that a plaintiff need not desegregate damages among those acts found to be unlawful," and I think that bears with what I said earlier.

That where the complaining party or the plaintiff in this action is not required to in essence ferret out and attribute the amount of damages to each particular act, the plaintiff still must be in a position to prove that the damages are attributable to the antitrust behavior and not simply as Mr. Degen has presented a loss in revenue to the Waukesha Freeman over a period of time where his assumption in his documents are that these damages are attributable to the acts of the Journal.

One other comment I would offer in that regard. Conley cited the case of Merco Distributing Corporation v. Commercial Police Alarm as to stand for the proposition that the defendant's unlawful conduct was a substantial factor in the plaintiffs, that is, the claimant's loss.

In other words, there must be some substantial fact or relationship that exists between the complained of conduct and the losses sustained by the plaintiff. The direct quote at Page 460 from that decision by Justice Abrahamson, is, "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the Court to direct a verdict for the defendant."

Dr. Gollop's testimony is replete with an analysis of the predatory pricing circumstances that he describes. It is replete with an analysis of the anticompetitive advertising contracts as he purports them to be.

This Court has found earlier in its decision that such conduct was not improper or unlawful but even given such, if they were this Court is wholly without a factual basis by way of this record as to the causation issue.

Dr. Gollop or anyone else has offered no opinion whatsoever that in fact the activities of the Milwaukee Journal are directly related substantial facts or material facts in the damages sustained purportedly by the Conley Publishing, particularly the Waukesha Freeman.

On that basis alone, Counts 4 and 5 are dismissed. Furthermore, however, it is the opinion of this Court that in useable form admissible at trial there has been no evidence offered to disaggregate the damages.

The report of Mr. Degen assumes a causation that does not exist at least not demonstratively having existed. No arguable facts in this court now to support the idea that there is a causation linkage between the activity of the Journal but even beyond that there is no effort to disaggregate the damages as they've been demonstrated respecting what Mr. Degen really is an analysis of lost revenues as a result of the lost subscribers.

Every analysis provided by Mr. Degen based upon the lost subscription rate in no way, shape, fashion or form has anyone come forward on behalf of Conley to describe the market conditions, the management styles, the programs that were offered other than to

acknowledge that perhaps some business decisions made by the Freeman over time have contributed to the loss of subscriptions and, therefore, this Court concludes that there has been no showing of disaggregate damages sufficient to raise a question before a jury as to factual dispute and, therefore, for all those reasons grants the motion in its entirety and dismisses the action with prejudice.

Mr. Dawson, I look for an order to this effect under the five-day rule. Is there anything else, gentlemen, we need to attend to this morning? First, on behalf of the Journal?

MR. DAWSON: No, Your Honor, thank you very much.

THE COURT: Mr. Parsons?

MR. PARSONS: Nothing further.

THE COURT: All right, gentlemen, thanks very much for your cooperation. Good luck to the parties.

(Proceedings concluded at 11:30 in the forenoon.)

STATE OF WISCONSIN)

)

WAUKESHA COUNTY)

I, Lori J. Boyer, Official Reporter, do hereby certify that I reported the foregoing matter and that the transcript, consisting of 23 pages, has been carefully compared by me with my stenographic notes as taken by me in machine shorthand and by me thereafter transcribed and that it is a true and correct transcript of the proceedings had in said matter to the best of my knowledge.

Dated this 9th day of October, 2001.

Lori J. Boyer

Lori J. Boyer, Official Reporter

APPENDIX A

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COURT OF APPEALS OF WISCONSIN
DISTRICT II

Appeal No. 01-3128

CONLEY PUBLISHING GROUP, LTD.,
FREEMAN NEWSPAPERS LLC and
LAKESHORE NEWSPAPERS, INC.,

Plaintiffs-Appellants,

v.

JOURNAL COMMUNICATIONS, INC. and
JOURNAL SENTINEL, INC.,

Defendants-Respondents.

On Appeal from the Circuit Court for Waukesha County, the Hon. Donald Hassin, Presiding
Case No. 00-CV-222

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Abbreviations Used in this Brief

A-Ap. __	Page in Appendix of Plaintiffs-Appellants Conley Publishing Group Ltd., *et al.* (*Waukesha Freeman*).
Br.	Brief and Appendix of Plaintiffs-Appellants
R.__	Document/Tab in Record on Appeal

Statement of Issue

Did antitrust plaintiffs' expert reports that failed to address elements of predatory pricing claims and damages that are required elements as a matter of law create questions of fact sufficient to avoid summary judgment on plaintiff's predatory pricing antitrust claim?

Trial Court Answer: No.

Appellate review of the summary judgment decision below is *de novo*. This court is to apply the same methodology used by the trial court. *Henry ex rel. Weis v. General Casualty Co.*, 225 Wis. 2d 849, 856, 593 N.W.2d 913, 916 (Ct. App. 1999).

Statement on Oral Argument and Publication

Should issues examined in the briefs require clarification, the defendants-respondents will be pleased to appear for oral argument.

To the extent the Court's decision clarifies past rulings or addresses new issues, publication would be appropriate.

Statement of the Case and Statement of Facts

A. Introduction

The *Waukesha Freeman* is an afternoon newspaper in a world that increasingly favors a morning newspaper. (R.17, Kackley ¶¶43-50.) Across the nation, afternoon papers have switched to morning – or they have failed. (*Id.*) The reasons are many but generally, in today's world, readers prefer morning newspapers because busy lifestyles don't leave time for evening reading. A quick skim of the day's news at breakfast is more like it. (*Id.*)

The *Freeman* does not offer a Sunday paper either. (R.6 ¶1.) The *Freeman* has not tried to tap the Sunday market that is so popular with readers and advertisers alike. (*See, e.g.,* R.17, Baseman ¶8.) A Sunday edition builds revenues and reputation. The *Freeman* has left that market to others.

The *Freeman* faces additional problems as well. Unlike the *Journal Sentinel*, the *Freeman* does not have a metropolitan focus, but concentrates on limited portions of Waukesha County. Readers have demonstrated their preference for a newspaper with a metro-wide approach, not a local focus. (R.17, Baseman ¶¶15-23; Hovind 27:3-4.)

Many advertisers are the same way. Their focus is metro-wide. The *Freeman* circulates in only a portion of Waukesha County, while the *Milwaukee Journal Sentinel* covers the entire area. For the many advertisers who want four-county coverage, the *Freeman* is no choice at all. (R.17, Baseman ¶¶18-22 and n.2.)

In deciding to remain an afternoon paper focused on Waukesha, the *Freeman* has chosen a difficult path. When

the *Freeman* surveyed Waukesha County residents in 1999, some 62.9% of them said there was "Nothing" that the *Freeman* could do "which would cause your household to subscribe." When publisher Jeffrey Hovind saw that, he felt "that in the minds of our non-readers, the *Freeman* has not established itself as a relevant product that they need to have in their homes." (R.17, Hovind 91:5-14.)

The *Freeman*'s problems are many. But rather than look inward to address those problems, the *Freeman* and its owner have chosen to blame the entirety of its plight on the *Milwaukee Journal Sentinel*. Ignoring the precarious situation it has placed itself in, the *Freeman* instead has alleged that one aspect of one *Journal Sentinel* marketing campaign is the sole source of all the *Freeman*'s problems.

In advancing its claims against the *Journal Sentinel*, the *Freeman* has relied upon an antitrust theory that is only rarely invoked and even less rarely successful – predatory pricing.[1] *See* Sec. II, below. Courts have all but abandoned this theory, finding that allegedly "predatory" prices are in reality low prices that serve primarily to benefit consumers.[2] Contrary to the purpose of the antitrust laws, ill-founded allegations of predatory pricing stifle competition.[3]

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1 *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 589 (1986) ("predatory pricing schemes are rarely tried, and even more rarely successful.").

2 *See, e.g., A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989) (prices less than cost today, followed by competitive prices tomorrow, bestow a gift on consumers).

3 *Matsushita*, 475 U.S. at 594 (mistaken inferences of predatory pricing are especially costly because they chill the very conduct that antitrust laws are designed to protect).

Courts are so skeptical of predatory pricing allegations that, since the seminal *Brooke Group*[4] decision in 1993, 34 of 37 predatory pricing cases in the federal courts were *dismissed on summary judgment* – if not earlier.[5]

B. The newspapers

The *Milwaukee Journal Sentinel* is published seven mornings a week by defendant-respondent Journal Sentinel Inc., a wholly owned subsidiary of defendant-respondent Journal Communications Inc. (R.17, Hoffman ¶2.) As of September 2000, the *Journal Sentinel's* daily circulation was 278,377 and its Sunday circulation was 461,025. (*Id.* ¶4.)

The *Waukesha Freeman* is published Monday through Friday afternoons and Saturday morning by plaintiff-appellant Freeman Newspapers LLC, which is owned by plaintiff-appellant Conley Publishing Group, Ltd. (R.6, ¶1.) The third plaintiff-appellant, Lakeshore Newspapers, Inc., has no role in this appeal. As of September 2000, the *Freeman's* circulation was 15,991. (R.17, Hoffman ¶5.)

The *Freeman's* circulation has been declining since 1993 after having been relatively steady at about 22,500 since 1987. (R.17, Ex. 147.)

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[4] *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[5] C. Scott Hemphill, *Note: The Role of Recoupment in Predatory Pricing Analyses,* 53 Stan. L. Rev. 1581, 1585 n.12 (2001). Hemphill, a critic of *Brooke Group*, observes that "Since *Brooke Group*, predatory pricing claims have been almost impossible to win.... When private plaintiffs bring cases, lower courts almost always grant summary judgment to defendants or dismiss on the pleadings." *Id.*

C. The *Freeman* faces difficulties

The circulation of afternoon newspapers nationwide has been declining precipitously for many years, dropping about 28% between 1995 and 1999, about the same as the actual decline in the *Freeman*'s circulation. (R.17, Baseman ¶71a.) In Waukesha County, the *Freeman* appears to have exhausted its market, having captured virtually all county readers who are interested in an afternoon paper. (R.17, Kackley ¶51.) Of 52,000 adults who prefer an afternoon paper, 48,900 already read the *Freeman*. (*Id.*)

Freeman executives admit their own actions are responsible for circulation declines. For example, upon buying the *Freeman* in May 1997, "[w]e stopped discounting as much as we had in prior years," leading to a "decline in circulation." (R.31, Doyle 52:3-19.) The *Freeman* also experienced a substantial decline in circulation after it increased subscription prices in 1999. (R.17, Baseman ¶71b.) Subscription prices had also been increased in 1995. (R.17, Ex. 28.) Conley circulation manager Kimberly Stapelfeldt testified that price increases hurt circulation. (R.17, Stapelfeldt 64:5-10.)

New or expanded weekly newspapers and shoppers appeared, competing with the *Freeman* for advertisers and readers. (R.17, Toske 104:10-18.) The *Freeman* has actually lost advertising revenue to one of its sister publications, *The Waukesha Post*, a free shopper. (R.17, Ciccantelli 76:11-20.)

Meanwhile, as the *Freeman's* expert, Prof. Frank M. Gollop, himself pointed out, large advertisers have little use

for the *Freeman*, which reached a smaller and smaller portion of the metropolitan audience.[6]

The *Freeman* also suffered from poor management. According to Mr. Hovind, the *Freeman* "was not very well marketed" to potential subscribers under its former owners, Thomson Newspapers. (R.17, Hovind 42:5-8.) Under Thomson, "the editorial staff was focusing primarily on the City of Waukesha" rather than the entire, much larger county market. (*Id.* 36:25-37:4.) It comes as no surprise, then, that the largest declines in *Freeman* circulation in recent years occurred in 1995 and 1996, under Thomson management. (R.17, Ex. 147; Degen Table 2.)

The *Freeman* also experienced significant turnover among its senior managers when Conley bought the paper in 1997. (R.17, Baseman ¶71d.) The sale itself can be seen as a disruptive event that would harm circulation. (*Id.*)

Meanwhile, recognizing the potential for expansion in rapidly growing Waukesha County, the *Journal Sentinel* significantly increased the resources devoted to the Waukesha zoned pages it publishes each day, adding staff and content to make the pages more attractive to readers.

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[6] "I can't imagine any single advertiser just wanting to reach only the Waukesha readers," Prof. Gollop testified. (R.31, Gollop 2d 209:11-13.)

> Q If I'm an advertiser and I want to reach all of the readers in the four-county Milwaukee metropolitan area, the Waukesha Freeman isn't a very good alternative for me, is it?
>
> A No.

Id. at 191:10-14.

(R.17, Baseman ¶71e.) Unlike the *Freeman,* the *Journal Sentinel*'s focus was county-wide. The *Freeman*'s own expert, Prof. Gollop, agreed that given the rapid growth and the favorable demographics of Waukesha County, "it would make sense for the *Journal* to focus there, sure." (R.17, Gollop 91:3-6.)

These changes have nothing to do with the *Journal Sentinel* Sunday-daily conversion program, and they have challenged the *Freeman* to respond competitively. *Freeman* publisher Hovind believes that normally the reason a newspaper becomes dominant in a market is not because of circulation discounts but "because it's done the best job of providing news and information to the subscribers in that market." (R.17, Hovind 61:8-14.) However, the *Freeman*'s own 1999 readership survey of Waukesha County residents found that the *Journal Sentinel* – not the *Freeman* – had successfully "branded itself as the local newspaper." (R.17, Hovind 87:18-22.)

D. Circulation supports advertising

Maintaining daily circulation levels is important to all paid newspapers, including the *Journal Sentinel.* Circulation supports a newspaper's advertising sales, with higher daily circulation generally resulting in higher daily advertising revenues. (R.17, Baseman ¶66; Kackley ¶3; Hoffman ¶7.) In the case of the *Journal Sentinel*, each new subscriber is worth about $200 in additional advertising revenue. (R.17, Baseman ¶68.) Subscription charges also provide direct revenue for the newspaper. (R.17, Hoffman ¶7; Kackley ¶3.)

With turnover among newspaper subscribers a continuous concern, the *Journal Sentinel* has found that con-

stant sales pressure is needed just to maintain circulation levels. (R.17, Hoffman ¶6.) Discounted subscription offers play an important role in newspaper marketing, increasing reported circulation and thereby supporting advertising sales. (R.17, Hoffman ¶7; Baseman ¶16; Kackley ¶¶3, 7.) Discounted subscriptions can also lead to full-price, long-term renewals. The *Journal Sentinel* therefore offers discounted subscription programs in all the areas it serves, including those in which Conley claims that the *Journal Sentinel* has a monopoly. (R.17, Hoffman ¶8.)

The *Freeman*'s own circulation managers recognize that discounted subscriptions do not need to produce a profit in terms of circulation revenue alone in order to benefit the paper. "[E]ven though that particular order might not be profitable, it's worth getting because of the long-term benefit" to the paper. (R.17, Hohnberger 35:8-18.) The *Freeman*'s experts recognize this as well. "One of the reasons a newspaper wants to maintain or increase its circulation is to maintain or increase its advertising revenue." (*See* R.17; *see also* Gollop 50:17-20; Gollop at 10; Degen at 3.) Emphasizing this fact, Conley's damages expert purported to calculate to the dollar the *Freeman's* loss in advertising revenue attributable to declining circulation. (R.17, Degen at 5.)

As a tool to build or maintain circulation, Sunday-daily conversions are a common business practice among newspapers. (R.17, Baseman ¶10(a); Kackley ¶9.) Newspapers use this approach because it is easier and more economical to "convert" a Sunday-only subscriber, a reader already familiar with the newspaper, to a 7-day subscription. It is more difficult and costly to persuade a non-subscriber to begin home delivery, even at discounted rates. (R.17, Kackley ¶¶8-12.)

Unlike "cold calls" to non-subscribers, where new cash must be obtained from the customer to fund the order, a Sunday-daily conversion requires no new cash, so there is no risk of non-payment. Also, because closing rates are relatively high, the cost per order is lower than on cold calls to non-subscribers. (R.17, Hoffman ¶11; Kackley ¶2.)

The *Journal Sentinel* Sunday-daily conversion program was structured to provide subscribers with a discount of 50% off published rates,[7] a standard industry discount recognized by the industry's auditing bureau. (R.17, Hoffman ¶¶13, 16.) *Journal Sentinel* (and its predecessor *The Milwaukee Journal*) has offered the 50%, Sunday-daily conversion to maintain or improve circulation since at least the fall of 1988[8]. (R.17, Pierce ¶¶2-4.) The program has been offered on a rotating basis throughout all territories within the metropolitan Milwaukee area (not just Waukesha County), through 50,000 or more telemarketing calls a year. (R.17, Pierce ¶¶2, 4; Hoffman ¶14.)

There is nothing unusual about the *Journal Sentinel*'s discount offers. The *Freeman* uses heavy discounts as well. For example:

- The *Freeman* offers 13 weeks at 50% off the newsstand price. (R.17, Hohnber-

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[7] The customer's full-price Sunday payment is sufficient to fund a 50% Sunday-daily rate for a period that is a few weeks shorter than the original Sunday subscription. As a 50% discount, the new daily subscription can be included in the newspaper's reported circulation.

[8] Conley asserts that the Sunday-daily conversion debuted in 1996. (Br. at 4.) However, it is undisputed that *Journal Sentinel* and its predecessor, *The Milwaukee Journal* offered the program regularly beginning in 1988.

ger 44:22-45:8, 47:8-19, 48:13-22, Exs. 6, 7, 13; Stapelfeldt 35:7-9.)

- The *Freeman* offers a "four-by-four" plan, which is four weeks' free delivery with a four-week subscription, for a net of 50% off the home delivery price. (R.17, Hohnberger 50:4-20, Ex. 18; Stapelfeldt 36:19-37:5.)

E. Summary dismissal of all counts

Discovery in this case continued for more than a year. After the close of discovery, the parties proffered experts to opine on the issues of liability and damages. Despite the opportunity for fact discovery and expert opinion, Conley was not able to marshal evidence sufficient to satisfy its burden, and Judge Hassin therefore dismissed Conley's entire action on summary judgment.

Conley's case relied on expert testimony. Conley's experts observed below (*see* page 7, *supra*) and Conley rightly concedes here (*see* Br. at 12-13) that advertising revenue is directly correlated with newspaper circulation. But in analyzing the Sunday-daily conversion program, its antitrust expert, Prof. Gollop looked only at the pre-conversion subscription revenues and failed to analyze the broader advertising revenues that make this program economically beneficial. Prof. Gollop did not consider or even attempt to account for the relationship between advertising revenue and increased circulation.

> Q: Did your analysis take into account any increased advertising revenue associated with maintaining or increasing subscriptions?
>
> A: It does only in the following sense. That if each additional conversion program generates a net loss to the *Journal* of $66, I really

> don't think it was necessary to say that one additional subscription would generate $66 in advertising revenue. If you can show that, that would be terrific. I don't have that kind of data, but I just can't believe one subscription generates $66 in added advertising revenue.
>
> Q: You don't know one way or another?
>
> A: I don't.

(R.17, Gollop 116:24-117:12.)

Had he looked at the data, he would have learned that a *Journal Sentinel* subscription generates not $66 but **$200** in additional advertising revenue, a number undisputed in the record. (R.17, Baseman ¶68.) Thus, Prof. Gollop concluded the conversion subscriptions were sold at a "loss" only because he ignored a significant source of revenue generated by each conversion.

Conley's primary expert on damages was Carl G. Degen. However, throughout his calculations, Mr. Degen assumed that the *Freeman*'s declining market share in Waukesha County was attributable solely to the *Journal Sentinel*'s Sunday-daily conversion program. (R.17, Degen at 2.) He therefore assigned 100% of the *Freeman* losses to the allegedly unlawful conduct of the *Journal Sentinel* and made no effort to account for or to allocate other causes of the *Freeman*'s decline, such as lawful, aggressive competition from the *Journal Sentinel*, reader dissatisfaction with afternoon newspapers, *Freeman* price increases, management changes and the *Freeman's* myopic news coverage. (*Id.*) He also supported his theory by incorrectly assuming that *Journal Sentinel* began offering Sunday-daily conversions in 1996, rather than 1988. (*Id.*)

Conley's operative Second Amended Complaint alleged four other causes of action. In addition to the predatory pricing claim, Conley alleged secret rebates to subscribers, exclusionary discounts in advertising, contracts in restraint of trade, and attempts to monopolize. (R.6.) Judge Hassin dismissed all five claims on summary judgment. (A-Ap. 001.) Conley has chosen to pursue on appeal only the predatory pricing claim.

Argument

Courts recognize the implausibility of an antitrust lawsuit that alleges a competitor's prices are "too low." Low prices benefit consumers, and they hurt competition only if the discounter can somehow boost prices to supra-competitive levels to recoup the losses in the future, a risky proposition. Reflecting these shortcomings, courts routinely rely on summary judgment to dismiss these claims. *See* Sec. II, *infra.*

Rather than trying to counteract the inherent frailty of its theory with hard facts and figures, Conley compounded the problem by offering only the sketchiest – and inadequate – support for its case. The practice of which Conley complains is standard in the industry, proof that its purpose is profit, not predation. Conley also failed to disaggregate it damages, another omission fatal to its antitrust claim.

This appeal can be resolved on just a few, undisputed facts. Those facts show, as a matter of law, that Conley lacks sufficient basis to take its case to a jury.

Summarized, the crucial and undisputed facts are these:

- Discounted subscription programs such as Sunday-daily conversions are common and beneficial marketing tools used by newspapers throughout the country, including the *Waukesha Freeman*;

- The *Journal Sentinel* uses the Sunday-daily conversion program throughout its circulation area, including those areas in which the *Freeman* claims *Journal Sentinel* has a monopoly and in which, therefore, *Journal Sen-*

tinel would have no incentive to engage in predatory pricing;

- A newspaper subscription yields two sources of revenue: subscription revenue and, more importantly, advertising revenue;

- Conley's expert, Prof. Gollop, makes no attempt in his analysis of predatory pricing to take into account the advertising revenue generated by the fact of full-time subscribers converting from Sunday-only status but, rather, considered *only* the subscription revenue associated with the conversion program;

- Prof. Gollop also makes no effort to identify how much *Journal Sentinel* "invested" or "lost" in the supposed scheme, or how those losses would be recovered;

- The *Freeman* admits that an array of factors, none related to the challenged conduct of *Journal Sentinel*, have caused a decline in *Freeman* circulation since 1996; and

- The *Freeman's* expert on damages, Mr. Degen, offered no basis, other than sheer speculation, for allocating that portion of the *Freeman's* decline in circulation to any causal connection with the allegedly unlawful conduct of the *Journal Sentinel*.

I. Summary judgment is particularly significant in antitrust cases.

The purpose of summary judgment is "to determine whether there are any disputed factual issues for trial and to avoid trials where there is nothing to try." *Caulfield v. Caulfield*, 183 Wis. 2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994). Summary judgment is appropriate when the

record, viewed in the light most favorable to the non-moving party, shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Wis. Stat. §802.08; *Swatek v. County of Dane*, 192 Wis. 2d 47, 61, 531 N.W.2d 45, 50 (1995). To survive a motion for summary judgment, a plaintiff must offer evidence sufficient to prove each essential element of its claim. *Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 292, 507 N.W.2d 136, 140 (Ct. App. 1993).

A. Summary judgment protects competition.

"Erroneous jury verdicts for plaintiffs in predatory pricing cases pose a unique threat." *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1197 (3d Cir. 1995) (affirming summary judgment dismissal of predatory pricing claims). In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986), the Supreme Court wrote:

> [C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.

"[T]he very ability to impose on competitors the heavy burden of antitrust litigation over claims that cannot be dismissed at the outset is dangerously anticompetitive in itself." *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 60 (2d Cir. 1979).[9]

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[9] This brief relies on federal case law. Chapter 133 is derived from the federal Sherman Act. The Wisconsin Supreme Court has

The reporters are full of summary dismissal under *Brooke Group*, many of them cited in the course of this brief.[10]

In contrast, Conley's lone summary judgment case, from Minnesota, is not reliable authority. Conley cites *Prestressed Concrete, Inc., v. Bladholm Bros. Culvert Co.*, 498 N.W.2d 274 (Minn. Ct. App. 1993) (Br. at 23-28). However, *Prestressed* was decided in early 1993, before *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and its progeny clarified the burdens that a predatory pricing plaintiff faces on summary judgment. Just as Wisconsin does, Minnesota applies federal law interpretations to its antitrust statutes, *Prestressed, id.* at 276, and, with Minnesota courts not reporting a predatory pricing case since *Prestressed,* there is no reason to assume they would not follow *Brooke Group.* In addition, the

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"stated many times that the construction of sec. 133.01(1) [now § 133.03] is controlled by federal decisions under the Sherman Act." *Prentice v. Title Ins. Co. of Minn.*, 176 Wis. 2d 714, 724, 500 N.W. 2d 658, 662 (1993).

[10] A non-exhaustive list: *Bailey v. Allgas, Inc.*, No. 01-10559, 2002 U.S. App. LEXIS 3674 (11th Cir. March 8, 2002) (expert's evidence insufficient, summary judgment affirmed); *Virgin Atl. Airways Ltd. v. British Airways Plc*, 257 F.3d 256, 259 (2nd Cir. 2001) (affirming grant of summary judgment); *American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1041-42 (N.D. Cal. 2001) (granting summary judgment); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 536 (5th Cir. 1999) (affirming grant of summary judgment); *Blue Cross & Blue Shield v. Marshfield Clinic*, 152 F.3d 588, 595 (7th Cir. 1998) (affirming grant of summary judgment); *Advo*, 51 F.3d at 1192 (affirming grant of summary judgment); *A.A. Poultry*, 881 F.2d at 1399, 1404 (affirming judgment notwithstanding the verdict); *Universal Amusements Co. v. General Cinema Corp.*, 635 F. Supp. 1505, 1527 (S.D. Tex. 1985) (granting directed verdict); *Brooke Group*, 509 U.S. at 219 (affirming judgment as a matter of law).

Prestressed plaintiff was able to assert a triable issue of fact because, unlike Prof. Gollop, the plaintiff's experts actually examined the defendants' financial records and performed a detailed cost accounting on the defendants' "prices as a whole." *Id.* at 278. Prof. Gollop did nothing of the kind, a fatal omission.

B. Wisconsin antitrust law likewise does not encourage unsupported or unprovable claims.

Conley argues Wisconsin's antitrust statutes should be an open pathway to the jury, because Chapter 133, Stats., encourages a "private attorney general" to combat monopolization. (*See* Br. 32-33.) However, it is also the expressed policy of Chapter 133 that it "be given the most liberal construction so as to achieve the aim of competition." *Id.* Unless dismissed on summary judgment, speculative allegations like Conley's hinder competition and harm consumers.

Adopting language from *Matsushita,* Wisconsin courts hold that "[i]f the factual context renders the nonmoving party's claim *'implausible,'* the nonmovant 'must come forward with more persuasive evidence to support their claim than would otherwise be necessary.'" *Fortier v. Flambeau Plastics Co.,* 164 Wis. 2d 639, 664-65, 476 N.W.2d 593, 603 (Ct. App. 1991) (emphasis in original), quoting *Matsushita,* 475 U.S. at 587. *See also Yahnke v. Carson*, 2000 WI 74 ¶19, 236 Wis. 2d 257, 269, 613 N.W.2d 102, 108 (affirming adoption of *Matsushita*).

The rarity of judicially approved predatory pricing claims requires that the court examine this claim carefully before concluding, as Conley contends, that it is one of those very few cases in which the claim is supportable.

Wisconsin law demands that Wisconsin courts, just like their federal counterparts, should be dubious of predatory pricing allegations that seek to raise – not lower – consumer prices.

II. Predatory pricing claims seldom succeed, and summary judgment disposes of the deficient claims.

Conley ignores the skepticism with which courts have greeted this theory in recent years.

A. Predatory pricing claims are speculative and implausible given the required elements of proof.

Courts realize that predatory pricing claims are economically implausible.

> A predatory pricing conspiracy is by nature speculative.... [T]he success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competitions.... [T]he predator must make a substantial investment with no assurance that it will pay off.

Matsushita, 475 U.S. at 588-89 (citations omitted).

In *Brooke Group,* the Supreme Court commented further on the "general implausibility of predatory pricing," 509 U.S. at 227, and the corresponding role of summary judgment:

> As we have said in the Sherman Act context, "predatory pricing schemes are rarely tried, and even more rarely successful," *Matsushita, supra*, at 589, and the costs of an erroneous finding of liability are high. "[T]he mechanism by which a firm engages in predatory pricing –

> lowering prices – is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition ... mistaken inferences ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Cargill, supra,* at 122, n. 17 (quoting *Matsushita, supra,* at 594.)

Brooke Group, 509 U.S. at 226-27.

Indeed, the nation's leading antitrust commentators have stated predatory pricing claims are all but extinct in the wake of *Brooke Group*. "By the stringency of its demand for proof of recoupment, the Court cleared the way for summary rejection of most predatory pricing claims." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, at 426 (1995 Supp.)

The elements of a claim of attempted monopolization based upon predatory pricing are clear and show why Conley's case cannot proceed to trial:

"First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices *must prove that the prices complained of are below an appropriate measure of its rival's costs*." *Brooke Group*, 509 U.S. at 222 (emphasis added). Second, a plaintiff must demonstrate "*a dangerous probability of [the defendant] recouping its investment in below-cost prices*." *Id.* at 224 (emphasis added). An investment in predatory pricing is not rational unless the predator has "a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." *Id.*

"These prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery;

rather, they are essential components of real market injury." *Id.* at 226.

B. Without sufficient expert evidence, Conley's claims could not advance.

As Judge Hassin recognized, Conley could not survive summary judgment unless it established the elements of its predatory pricing claims through expert testimony.

In antitrust litigation, "expert testimony is a practical if not legal necessity." *Chicago College of Osteopathic Med. v. George A. Fuller Co.*, 801 F.2d 908, 911 (7th Cir. 1986). *See also, e.g., Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling, Inc.*, 690 F.2d 411, 415 (4th Cir. 1982) (plaintiff's antitrust claims dismissed when not supported by expert testimony). Conley tacitly accepts this practical and legal necessity through its expert-based arguments on appeal.

Where expert testimony is required in a case, it is also required if a plaintiff is to withstand a motion for summary judgment. This is not, as Conley argues, a rule limited to federal courts. Wisconsin takes the same approach. "When determining whether a trial must be had, the court need only decide whether the party bearing the burden of producing admissible opinion evidence has made a *prima facie* showing that it can do so." *Dean Med. Ctr., S.C. v. Frye*, 149 Wis. 2d 727, 734-35, 439 N.W.2d 633, 636 (Ct. App. 1989) (discussing role of expert testimony on summary judgment). "Conversely, if the party not bearing the burden can show through admissions or otherwise that the party bearing the burden of production cannot meet it,

then summary judgment may be entered against the latter." *Id.* at 735 n.3, 439 N.W.2d at 636 n.3.[11]

Trying to create an appellate issue, Conley argues that Judge Hassin simply found the opinions "unpersuasive" (Br. at 19, *see also* Br. 24-25). But the opinions of Conley's experts are not just unpersuasive. Their significant deficiencies made them essentially irrelevant, as a matter of law. The opinions of Conley's experts lacked evidentiary support and, as a matter of law, fell far short of the analysis required of Conley to make its *prima facie* showing and survive summary judgment. *See Dean Med.*, 149 Wis. 2d at 734-35, 439 N.W.2d at 636. *See also Advo*, 51 F.3d at 1198 ("expert testimony without such a factual foundation cannot defeat a motion for summary judgment").

Conley notes Wisconsin's liberal standards for admissibility of expert testimony and appears to argue that the Court should disregard cases where the federal *Daubert* standard may have played a role. (Br. at 24-25 and n. 93, referring to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).) However, even Wisconsin's non-Daubert approach to expert testimony would not allow, as here, testimony that provides no more than "speculative or conjectural" basis for claims or damages. *See Sopha v.*

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[11] *See also Kasbaum v. Lucia*, 127 Wis. 2d 15, 22, 24, 377 N.W.2d 183, 186-87 (Ct. App. 1985) (defendants in medical malpractice case entitled to summary judgment dismissing complaint on defendants' showing that plaintiff had no medical expert to establish his claim); *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 374, 541 N.W.2d 753, 755 (1995) (stating general rule that expert testimony is required when "unusually complex or esoteric issues are before the jury.").

Owens-Corning Fiberglass Corp., 230 Wis. 2d 212, 227, 601 N.W.2d 627, 634 (1999).

When, as here, an antitrust expert's opinion is considered inadequate *as a matter of law* to defeat summary judgment, the claim is dismissed. *See, e.g., American Booksellers Ass'n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031 (N.D. Cal. 2001). *American Booksellers* alleged violations of the Robinson-Patman Act by the nation's two largest bookseller chains. *Id.* at 1035. In expressing his opinion on the causal connection between the challenged discounts and the damages claimed by plaintiffs, plaintiffs' expert did not take into account a number of market factors which defendants contended influenced profitability and consumers' buying decisions. *Id.* at 1037-41. Most significantly, and directly analogous to the approach of Mr. Degen in the case at bar, the expert was told to assume, and did assume, that "the entire price differential between defendants and plaintiffs was illegal." *Id.* at 1040. Noting that a variety of factors could affect or influence pricing differentials and the consequence of such differentials, none of which were taken into account by plaintiffs' expert, Judge Orrick concluded:

> The Fisher model contains entirely too many assumptions and simplifications that are not supported by real-world evidence. As a result, its conclusions [regarding causal injury and the amount of damages caused by that injury] are entirely too speculative to support a jury verdict.

Id. at 1041-42.

The court granted summary judgment, holding that plaintiffs "cannot prove causation of actual injury without Fisher's expert testimony because only expert testimony

can demonstrate that any injury to plaintiffs was caused by defendants' unlawful conduct, and not because of lawful competition or other factors." *Id.* at 1042.

The *American Booksellers* case stands as a model for this one.

III. Conley failed to present evidence of predatory pricing sufficient to survive motion for summary judgment.

Conley failed to make the required showings to avoid summary judgment.

A. Conley ignores the legitimate business benefits of the *Journal Sentinel* offer.

The *Journal Sentinel*'s use of this discount throughout the metro area since 1988 is undisputed in the record. (R.17, Pierce ¶¶2, 4.) So is the fact that many other newspapers use the same approach for valid business reasons. (R.17, Kackley ¶¶9, 17.) "Business activity is not 'anti-competitive' so long as there is 'a legitimate business justification for the conduct.'" *United States v. AMR Corporation*, 140 F. Supp. 2d 1141, 1193 (D. Kan. 2001) (dismissing predatory pricing claims against airlines on summary judgment), quoting *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1550 (10th Cir. 1995), relying on *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 483 (1992).

Prof. Gollop himself conceded this important point, which alone is sufficient to defeat Conley's claims. He specifically agreed that increasing or maintaining daily circulation is "a valid business reason" for the *Journal Sentinel* to make the Sunday-daily conversion offer. (R.17, Gollop

103:16-104:7.) Only if the challenged conduct "has no rational business purpose other than its adverse effects on competitors [is] an inference that it is exclusionary supported." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000) (quotation omitted). *See also Trace X Chem., Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984) ("ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct").

To survive summary judgment in predatory pricing cases such as this one, "the party with the burden of proof must proffer evidence that tends to preclude an inference of permissible conduct." *Virgin Atl. Airways v. British Airways Plc*, 69 F. Supp. 2d 571, 578 (S.D.N.Y. 1999), *aff'd*, 257 F.3d 256 (2d Cir. 2001) (dismissing predatory pricing claims on summary judgment). Here, the undisputed evidence is to the contrary – the conduct complained of is not only permissible, it is routine.

B. Conley has no evidence of conversion revenues being below cost, because its expert did not consider advertising revenue attributable to increased circulation.

Even though Conley's failure to show recoupment is itself sufficient to dismiss the case,[12] Conley failed to show that the *Journal Sentinel* Sunday-daily conversion offer was below an appropriate measure of cost. Indeed, the absence of any proof of the "loss" attributable to the alleged

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[12] "Only if market structure makes recoupment feasible need a court inquire into the relation between price and cost." *A.A. Poultry Farms*, 881 F.2d at 1401. *See* Sec. III.C.

predatory conduct, the required first element of a predatory pricing claim, contributes to the failure of Conley to raise a question of material fact with respect to Journal Sentinel's "dangerous probability" of recoupment of that loss, the equally important second required element of its claim.

Allegations of predatory pricing must be based on an "appropriate measure of ... costs." *Brooke Group*, 509 U.S. at 222. Conley's measure of cost is not "appropriate," however, because it is contrary to basic principles of newspaper economics. There is no law or economic theory that says newspapers must make money on each subscription or even on all subscriptions. Indeed, there are thousands of free distribution newspapers in the United States. (R.17, Baseman ¶67.) Radio and television stations do not charge their listeners. Most internet sites are free. But no one would argue they are engaged in price predation.

Subscriptions to paid newspapers are discounted because they are the vehicles that newspapers use to support their advertising sales. (R.17, Baseman ¶16; Kackley ¶3; Hoffman ¶7.) Selling more newspapers allows a newspaper to charge higher rates for advertising. (*Id.; see also* Baseman ¶68.) And there is also the intended possibility that a discounted subscription will be renewed at full rates.

Prof. Gollop certainly understood the logical business relationship between circulation and advertising. He agreed that "one of the reasons a newspaper wants to maintain or increase its circulation is to maintain or increase its advertising revenue." (R.17, Gollop 50:17-20.) He agreed that the purpose of the Sunday-daily conversion program is to "try to build circulation for advertising purposes." (R.17, Gollop 96:2-3.) That is why *Journal Sentinel*

has used the plan throughout its metro circulation area since 1988.

Yet having conceded those points, Prof. Gollop improperly ignored them, leaving his analysis legally deficient.

Professor Gollop ignored entirely the $200 in advertising revenue the *Journal Sentinel* generates from each new subscriber. He made no attempt to account for the revenue associated with discounted subscriptions renewed at full price. And his view is discredited by the party admissions of the *Freeman*'s own circulation managers, who recognize that "[e]ven though that particular order might not be profitable, it's worth getting because of the long-term benefit" to the paper. (R.17, Hohnberger 35:8-18.)

The Second Circuit considered a situation similar to this one in *Buffalo Courier Express, supra.* There, an evening daily planned to give five weeks of its new Sunday paper to existing daily subscribers at no additional charge. 601 F.2d at 51. The Second Circuit held that free newspapers were a standard business practice and – important to this case – that "there was no sufficient evidence that the five week sampling would produce even a short-term loss for the *News*' operations *taken as a whole*." *Id.* at 55 (emphasis added). *See also Kentmaster Mfg. Co. v. Jarvis Prods. Corp.*, 146 F.3d 691, 694 (9th Cir. 1998) (affirming dismissal of all claims; defendants' practice of providing free meatcutting equipment was not illegal when defendant more than made up its losses on continuing sales of replacement parts).

Reflecting the benefits of low-cost subscriptions to the newspaper's overall profitability, an analysis of sales below

cost must examine the revenue generated by a complete "product line," in this case the newspaper itself. The ABA's 1999 *Sample Jury Instructions in Civil Antitrust Cases*, at C-68 (1999 ed.) (which Conley cited below (R.23:45)), state the law:

> ***Instruction 9***
> ***What Products Must Be Considered in Determining Whether Prices Are Below Cost***
>
> In determining whether defendant sold at a price below its reasonably anticipated costs, ***you must consider defendant's prices on all products in the same product line and defendant's costs for that product line as a whole.*** For example, if defendant's price for one size or package of its product is below its cost, but the prices that it will receive on other sizes and packages of the same product are sufficient to recover all of the defendant's cost on that product line, you may not base a verdict of predatory pricing on the one below-cost price. [*Consider inserting a description of the product offering based on the record in the case.*] ***To find for plaintiff on this element you must find that the defendant's prices for the product line, as a whole, were not reasonably anticipated to return defendant's cost on that product line, as a whole.***

Sample Jury Instructions, at C-68 (emphasis added).

Prof. Gollop made no attempt to determine whether the Sunday-daily conversion program would result in a loss for the *Journal Sentinel's* operation *taken as a whole*. His strained analysis is not "an appropriate measure of ... costs," *Brooke Group*, 509 U.S. at 222, and his evidence is insufficient to support Conley's claim as a matter of law.

C. Conley failed to show the "dangerous probability" of recoupment necessary to survive motion for summary judgment.

The second essential element of a predatory pricing claim is proof of a "dangerous probability" that the defendant will recoup its short term predation losses by charging monopolistic prices after the plaintiff is driven from the market. *Brooke Group, id.* at 224. Another insurmountable flaw in Prof. Gollop's analysis was his failure to even attempt to identify how much the *Journal Sentinel* had supposedly "invested" (lost) in its alleged predatory pricing scheme, or to show how that investment/loss would be recouped.

1. A detailed analysis is required.

Predatory pricing is economically rational only if short term losses are more than offset by future monopoly profits. Otherwise, even below cost price cutting reflects not unlawful predatory pricing but lawful, aggressive competition, which the antitrust laws seek to promote.

"Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market." *Brooke Group, id.* at 226. "If market circumstances or *deficiencies in proof* would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, *the plaintiff's case has failed*." *Id.* (emphasis added).

In a predatory pricing action, "to survive summary judgment a plaintiff must have *evidence* that the predation

scheme is economically rational." *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 528 (5th Cir. 1999) (affirming summary dismissal) (emphasis added), relying on *Eastman Kodak Co.*, 504 U.S. at 468-69. Therefore, summary judgment is appropriate "if recoupment is unlikely and the monopolist thus had no motive to engage in the alleged activity *unless proper direct evidence of the scheme* is introduced." *Stearns*, 170 F.3d at 528, summarizing *Matsushita*, 475 U.S. at 594 (emphasis added).

Just last month, the Eleventh Circuit affirmed summary judgment dismissal of a predatory pricing case where the report of the plaintiff's expert was insufficient to show recoupment. *Bailey v. Allgas, Inc.*, No. 01-10559, 2002 U.S. App. Lexis 3674 (11th Cir. March 8, 2002). In *Bailey*, the expert (unlike Prof. Gollop) had actually calculated the dollar amount of the defendant's "investment" in the scheme and had described a specific recoupment scenario. But even that was not enough when the expert (like Prof. Gollop) ignored realities of the marketplace that would affect the recoupment scheme he described. *See id.*, 2002 U.S. App. Lexis 3674 at *48.

2. Conley's recoupment analysis was deficient.

Conley did not and cannot meet its burden of producing "evidence that the predation scheme is economically rational." *See Stearns*, 170 F.3d at 528. Conley's sole "evidence" is Prof. Gollop's opinion that recoupment is likely because he says so. (Br. 25-28.) That is not enough; his opinion is not supported by any facts or "close analysis." *See Brooke Group,* 509 U.S. at 226. *Brooke Group* requires showing not just a theoretical possibility of recoupment, but a "dangerous probability," *id.* at 224, a standard Conley ig-

nores in its brief. (*See, e.g.*, Br. at 28 where Conley says a jury could conclude a "reasonable opportunity" to recoup, not a "dangerous probability.").

Prof. Gollop simply opines that barriers to entry are high. (Br. 27-28.) Conley then argues this opinion alone ought to be enough for a jury to infer that, if the *Freeman* folded, the *Journal Sentinel* would have Waukesha County to itself and could charge whatever it wanted to recoup years of "investment" in the alleged scheme. (Br. at 28.) For a number of reasons, this analysis fails to create a disputed material fact necessary to avoid summary judgment. Under the applicable legal standards, Prof. Gollop's analysis of recoupment is so deficient that a jury would not have a basis to find in Conley's favor.

a. Prof. Gollop and Conley have no idea how much was supposedly "invested," or how it would be recovered.

Contrary to the requirements of *Brooke Group*, and as noted above, Prof. Gollop did not calculate or even guess "the amounts expended on the predation, including the time value of the money invested in it." *See* 509 U.S. at 225. Nor did he attempt to estimate what prices the *Journal Sentinel* would need to charge to recoup its losses. More importantly, he never advanced any evidence to suggest that such prices might even conceivably be attainable.

He never considered – and certainly never attempted to quantify or even qualitatively assess – other factors that might prevent the *Journal Sentinel* from recoupment. Readers might simply choose to do without a newspaper if the price goes up too high. As the *Freeman's* own managers

realize, price increases impair circulation, reducing revenues. (R.31, Doyle 52:3-19; Stapelfeldt 64:5-10.) Moreover, as noted elsewhere, raising subscription prices could create a twofold loss – first, in a loss of subscribers and second, in the correlated loss in advertising revenue. (*See, e.g.*, R.17, Hoffman ¶7.) It is clear from Prof. Gollop's report and from what Conley says about the report in its brief that even after a year of discovery and all the work of its experts, Conley has no idea how much money is supposedly at stake in the alleged scheme, or how, or whether, *Journal Sentinel* would recover those sums.

b. Prof. Gollop's analysis makes no economic sense.

As described by Conley, Prof. Gollop's analysis "makes no economic sense" given the realities of the marketplace. *See Matsushita*, 475 U.S. at 587 (more persuasive evidence than usual is required to support claims that "make no economic sense"). Under his theory, the *Journal Sentinel's* investment in a predatory pricing scheme would produce benefits only in Waukesha County, the "relevant economic market[ ] for daily paid newspaper subscriptions" that Prof. Gollop defined (R.17, Gollop at 2-3) (but which *Journal Sentinel* does not concede). *See Brooke Group,* 509 U.S. 222 (allegations of predatory pricing assume effort to control defined relevant market).

Yet the material fact that the *Freeman* is not the only constraint, or even any constraint, on *Journal Sentinel* prices is shown by the undisputed fact that *Journal Sentinel* continues to offer the same discounts throughout the metro area, outside the defined Waukesha County market, in areas where the *Freeman* has no presence. (R.17, Hoffman ¶14; Pierce ¶4.) If Prof. Gollop's theory bore any

relation to reality, the *Journal Sentinel* would not offer these conversion packages in areas where Conley claims the *Journal Sentinel* has a monopoly. Indeed, under Prof. Gollop's rationale, one would expect the *Journal Sentinel* to be charging much higher prices in these "monopoly" areas and lower prices in Waukesha.

However, as the record demonstrates, the evidence does not match Prof. Gollop's economic theory and, indeed, refutes it. *Journal Sentinel* makes the same Sunday-daily conversion offer throughout the entirety of its territory that it periodically offers in Waukesha County, and its subscription rates throughout its entire area of circulation are identical to the subscription rates offered in Waukesha County. (R.17, Baseman ¶¶59-61.) *Journal Sentinel* does not vary prices depending on whether a subscriber resides in an area where Conley claims the *Journal Sentinel* has a "monopoly." (R.17, Hoffman ¶14; Pierce ¶¶2, 4.)

By definition, then, other market forces constrain *Journal Sentinel* prices or encourage *Journal Sentinel* discounts in areas both inside and outside Waukesha. That is, the discounts make sense regardless of competition with the *Freeman,* and *Journal Sentinel* would face the same restraints if it tried to raise prices in Waukesha County even after the *Freeman*'s hypothetical demise. Prof. Gollop does not dispute either the fact or the importance of these market factors, or otherwise present evidence which raises a dispute of material fact on this critical element of Conley's claim. He is simply silent on the point, another reason his analysis cannot create a genuine issue of material fact sufficient to avoid summary judgment.

3. With no showing of recoupment, Conley's claim was properly dismissed.

Recognizing the shortcomings in Prof. Gollop's analysis, Judge Hassin properly dismissed the claim. Conley failed to meet the plaintiff's burden on summary judgment "to make a showing sufficient to establish the existence of an element essential to that party's case." *Transportation Ins. Co*, 179 Wis. at 292, 507 N.W.2d at 140; *Yahnke*, 2000 WI 74, ¶19, 236 Wis. 2d at 269, 613 N.W.2d at 108. Judge Hassin ruled:

> ... Dr. Gollop should be required to offer the record some probability as to what the costs of the Journal are respecting its investment in this below cost pricing.
>
> The record is silent respecting any such testimony. There is no showing by Dr. Gollop or any other witness in this record at this point that the *Journal [Sentinel]* will at some future date be charging higher prices for its paper, and secondly, what the necessary amount it needs to recoup from its loss is or even that the *Journal [Sentinel]* has or will suffer a loss as a result of the Sunday subscriber program.
>
> Therefore, this Court concludes that there are no facts to support a predatory pricing circumstance that is alleged.

A-Ap.016, Oral decision of October 2, 2001.

This case is like *Advo,* where the plaintiff proffered expert testimony that the newspapers had offered a competing direct mail product at prices below its costs. 51 F.3d at 1198. The Third Circuit upheld the lower court's summary judgment decision dismissing all claims against the

newspapers, holding that neither of Advo's experts had sufficient evidence to support its claims. *Id.* at 1198-99, 1204-05.

> As *Brooke Group* makes clear, expert testimony without such a factual foundation cannot defeat a motion for summary judgment. "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. . . . Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." *Brooke Group*, 509 U.S. at 242, 113 S. Ct. at 2598. Advo failed to present *facts* establishing a genuine issue over whether PNI priced circular advertising distribution services below some measure of costs. This omission provided sufficient grounds for granting summary judgment.

Id. at 1198-99.

Conley and Prof. Gollop have no *evidence* on the "dangerous probability" of recoupment, just unsupported speculation. As in *Brooke Group,* the "anticompetitive scheme . . . alleged, when judged against the realities of the market, does not provide an adequate basis for a finding of liability." *Brooke Group*, 509 U.S. at 230. Conley's expert testimony fails to show "a dangerous probability" of recoupment, *Id.* at 224, and the *Journal Sentinel* defendants are therefore entitled to summary judgment dismissing the claim.

D. Conley's resort to allegations of "intent" and "targeting" cannot overcome the fundamental economic flaws in its claim.

Conley claims that the *Journal Sentinel* "targeted" *Freeman* readers and tried to win their business. (*See* Br. at 5-7.) But that is not unlawful. "Targeting" the *Freeman* is nothing more than competition, that which the antitrust laws seek most to *encourage*.[13]

Conley also relies on comments about the *Journal Sentinel*'s intentions with regard to the *Freeman* made by *Journal Sentinel* Publisher Keith Spore. (*See* Br. at 4, 33.) The Seventh Circuit had no time for such unreliable "evidence" in an antitrust case:

> Take, for example, the statement David Rust made to Phillip Gressell: "We are going to run you out of the egg business. Your days are numbered." Undoubtedly Rust wanted to leave Gressell scratching in the dust, but drive to succeed lies at the core of a rivalrous economy.

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[13] Conley mischaracterizes the *Journal Sentinel* marketing efforts in this period, which were far broader than Waukesha County. *See, e.g.*, R.27 Ex. I, 1997 Marketing Plan, pg. D0010137 *et seq.*, describing a wide-ranging effort including in-store sales, fundraising sales, special events, single-copy inserts, targeted direct mail, bill inserts, college sales and a number of discounted rate packages, all of which were in addition to any programs aimed at Waukesha County and which were available throughout the metro area.

Conley also misstates the record when it says *Journal Sentinel* had an " 'aggressive campaign' to take subscribers away from the *Freeman*." (Br. at 7.) The "aggressive campaign" was in fact a telemarketing department program directed to all of Waukesha County, where by far the majority of households do *not* take the *Freeman*. (R.17, Baseman ¶¶18-19, 25 (discussing Freeman penetration rates.))

> Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition.

A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989). *See also International Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1396 (8th Cir. 1993) (statements like company president's warning to competitor to "[s]tay out of my market" provide "no help in deciding whether a defendant has crossed the elusive line separating aggressive competition from unfair competition.").

Mr. Spore's comment that the *Freeman* would be unlikely to survive is not sinister. It was accurately predictive. He is stating a fact of newspaper life, one that courts have recognized:

> The economics of the newspaper industry have made it virtually impossible for more than one general circulation daily newspaper to survive in competition in the same city. When one newspaper rises to a certain dominance in a geographic area, advertisers are able to reach their intended audiences with placements in one newspaper rather than two or more; to cut advertising costs, advertisers have tended to eliminate advertising in the smaller general circulation papers. Since lower circulation rates lead to fewer advertisements, and fewer advertisements make a newspaper less attractive to readers who value the information advertisements provide, declines in advertising and circulation tend to aggravate one another. This process gathers momentum and the decline in a weaker newspaper's business becomes self-fulfilling, leading almost inevitably to its demise.

Reilly v. Hearst Corp, 107 F. Supp. 2d 1192, 1198 (N.D. Cal. 2000).

Nor can Conley argue that approaching *Freeman* readers with subscription offers (*see* Br. at 5) demonstrates intent to monopolize.[14] "It is not illegal for a company to try to attract business, especially at the expense of a competitor. Such practices are everyday occurrences in the business world." *Independent Milk Producers Coop. v. Stoffel*, 102 Wis. 2d 1, 10, 298 N.W.2d 102, 106 (Ct. App. 1980). A pitch to a competitor's customers is "exactly what we would expect from a legitimate competitor." *Advo*, 51 F.3d at 1199. Prof. Gollop agreed that given the rapid growth and the favorable demographics of Waukesha County, "it would make sense for the *Journal* to focus there, sure." (R.17, Gollop 91:3-6.)

As a matter of law, Conley's "evidence" that defendants "targeted" the *Freeman* is irrelevant. Competitors are supposed to compete, vigorously, including for each other's customers. Intent, aggressive or "commercially incorrect" language cannot substitute for the legal imperative that Conley prove both predatory pricing and a dangerous probability of recoupment. As discussed above, Conley proved neither.

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[14] The *Freeman* did the same thing. *Freeman* telemarketers who called homes already receiving the *Journal Sentinel* were told to say, "It's a good time to compare our newspaper to the Milwaukee newspaper and see which covers Waukesha County the best." (R.17, Hohnberger 53:16-22 and Ex. 20.)

IV. Conley failed to offer any damage theory, or facts in support of any damage theory, that would permit an estimate of damages without sheer speculation.

A. The requirement for disaggregation of damages is an important element of antitrust law.

In proving damages, an antitrust plaintiff must segregate out the effects of its own mismanagement or of legitimate forces at work in the marketplace. The Seventh Circuit applied this rule in *MCI v. AT&T,* 708 F.2d 1081 (7th Cir. 1983).

> When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. . . . To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful.

Id. at 1162-63 (citations omitted) (rejecting plaintiff's proof of damages).[15]

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[15] Judge Hassin quoted this language with particular interest. (A-Ap. 021.) This "disaggregation of damages" rule has been applied by numerous courts in a variety of circumstances. *See Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1243 (7th Cir. 1982) (holding that, wherever possible, an antitrust plaintiff must "disaggregate the damage sum and apportion the amount of damage caused by each of [the challenged] business practices."); *Southern Pac. Communications Co. v. AT&T,* 556 F. Supp. 825, 1090 (D.D.C. 1982) (stating that the "trier of fact must be able to determine from the damage evidence whether each of the particular actions alleged to form an antitrust violation 'materially contributed' to plaintiffs' injury."); *Litton Sys., Inc. v. AT&T*, 700 F.2d 785, 825 (2d Cir. 1983) (noting that courts have held that damage

Blue Cross & Blue Shield v. Marshfield Clinic, 152 F.3d 588 (7th Cir. 1998), a Wisconsin antitrust case grounded in part on Chap. 133, Stats., provides clear direction. In *Blue Cross*, the trial court properly granted summary judgment dismissing the plaintiff's damages case because "no reasonable jury could estimate the plaintiff's damages from the reports of the plaintiff's experts." *Id.* at 594. The Seventh Circuit found expert reports "worthless" when, with one minor exception, they attributed the basis for all damages to the alleged unlawful division of markets, "with no correction for any other factor.... Statistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment." *Id.* at 593 (relying on *Brooke Group* and other decisions). "So the district judge was right to throw out the damages claim on summary judgment." *Id.* at 595.

Likewise, in *Universal Amusements Co. v. General Cinema Corp.*, 635 F. Supp. 1505 (S.D. Tex. 1985), the court applied the disaggregation rule in circumstances essen-

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studies are inadequate when only some of the conduct complained of is found to be wrongful and damage study cannot be disaggregated); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965, 1013-14 (N.D. Cal. 1979) (stressing that causation proof must be "closely connected to the individual acts complained of" and that the plaintiff must show "how much injury each act caused"); *Van Dyk Research Corp. v. Xerox Corp.*, 478 F. Supp. 1268, 1326 (D.N.J. 1979) (stating that "the plaintiff, in proving the fact of injury, must prove a direct and proximate causal connection between an alleged unlawful act and the plaintiff's alleged injury"); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 434 (N.D. Cal. 1978) (holding that the law requires antitrust plaintiffs, where possible, "to isolate the impact of each act" challenged as unlawful).

tially identical to those presented here. Referring to plaintiff's expert on damages, the court explained that:

> Dr. Smith's causation theory essentially boiled down to the following syllogism: (1) Champions suffered a financial loss since the Houston distribution market was not truly competitive and Champions could theoretically have earned more money under a truly competitive market, (2) the various defendants often engaged in assorted anticompetitive practices, and thus (3) the defendants' conduct caused all of Champions' theoretical losses.
>
> Dr. Smith also fatally failed to address other likely causes of Champions' poor performance such as its management's lack of prior research and experience.

Id. at 1525. The court held that such expert reasoning was insufficient, and directed a verdict in the defendant's favor at the close of plaintiff's case. *Id.*

Summary judgment is appropriate here for exactly the same reason. Conley's attempt to prove its damages relied entirely on Mr. Degen's report. Mr. Degen simply assumed that *all* of the *Freeman's* losses in circulation since 1996 – every single lost customer – was caused by the *Journal Sentinel*'s allegedly anticompetitive conduct. But Mr. Degen's analysis is simply and indisputably insufficient as a matter of law.[16]

The *Freeman's* own admissions confirm some of the many causes of the *Freeman's* declining circulation that Mr.

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[16] In this regard, see discussion of *American Booksellers* case, *supra*, at pp. 21-22.

Degen failed to exclude from his damages analysis. *Freeman* and Conley executives admitted they lost subscribers because they curtailed discounts, because the paper had been mismanaged under prior owners, because the paper had focused on the City of Waukesha instead of the entire county. (*See* pp. 4-6, *supra*.) The *Freeman* started its own "downward spiral" (*see* Br. at 13), and its experts simply failed to account for these and other competitive factors and market forces.

Journal Sentinel does not contend that an antitrust plaintiff must disaggregate its damages as to every possible cause of the damages claimed. But when the plaintiff itself admits that factors other than the claimed misconduct caused the damages claimed, plaintiff's failure to account for those factors leaves no bases other than speculation to assess the consequences of the alleged misconduct, *even under the plaintiff's view of the facts.*

B. Wisconsin policy likewise mandates causal disaggregation.

Judge Hassin's holding that "this Court is wholly without a factual basis by way of this record as to the causation issue" (Br. at 33, R.40 at 20) was another way of saying that the Gollop and Degen analyses, even given full weight, were insufficient as a matter of law to support Conley's allegations that it was harmed by illegal conduct of the *Journal Sentinel.*

Judge Hassin's ruling on this point was well grounded in Wisconsin law.

"In Wisconsin, a claimant cannot recover for speculative or conjectural damages." *Sopha,* 230 Wis. 2d at 227, 601 N.W.2d at 634. "Recovery for damages may be had for

reasonably certain injurious consequences of the tortfeasor's negligent conduct, not for merely possible injurious consequences." *Id.* at 226-27, 601 N.W.2d at 634 (citations omitted). *Sopha's* broader holding is that no cause of action accrues while damages remain speculative. *See id. See also Kempfer v. Automated Finishing, Inc.*, 211 Wis. 2d 100, 130, 564 N.W.2d 692, 704 (1997) (employment case holding that "recovery will be denied if it is speculative and uncertain whether damage has been sustained"). In *Sopha*'s terms, Conley has no cause of action, because it has nothing more than speculation as to damages.

In any action, a plaintiff cannot recover unless there is "a causal connection between the conduct and the injury; and [ ] an actual loss or damage as a result of the injury." *Martindale v. Ripp*, 2001 WI 113 ¶33, 246 Wis. 2d 67, 89, 629 N.W.2d 698, 707 quoting *Rockweit v. Senecal,* 197 Wis. 2d 409, 418, 541 N.W.2d 742, 747 (1995) (action fails if link not established).

This is a tort action. *See, e.g., Blue Cross & Blue Shield*, 152 F.3d at 592 ("A private suit under the antitrust laws is a suit seeking relief against a statutory tort, and the principle that there is no tort without an injury is applicable to it."). Yet Conley improperly relies upon a contracts case in an effort to persuade that Wisconsin does not require disaggregation of damages in antitrust actions. (Br. at 38, citing *Reiman Assocs., Inc. v. R/A Adver., Inc.*, 102 Wis. 2d 305, 322, 306 N.W.2d 292, 301 (Ct. App. 1981) (addressing contract dispute)). Conley wrongly asserts that, "[i]n all cases," there is no requirement that a plaintiff's "loss [must] be segregated proportionately." (*Id.*) Conley misreads *Reiman*. The passage Conley quotes (Br. at 38) is actually an excerpt from *Corbin on Contracts*, and is preceded in *Reiman* by the words (not quoted by Conley),

"in contract actions." Conley's *Reiman* passage says nothing about segregating tort damages and nothing at all to contradict the principle that damages in an antitrust action can be assessed only for unlawful conduct, not for lawful conduct, and certainly not for conduct attributable solely to the plaintiff or to market forces generally.[17]

Conley's reliance on *Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 190 Wis. 2d 650, 529 N.W.2d 905 (1995) (Br. at 31-33) is misplaced. *Carlson & Erickson* does nothing to undermine two fundamental principals of law: (1) the plaintiff has the burden of proof, and (2) the plaintiff must show that its damages were proximately caused by the defendant's unlawful conduct.

Conley's reliance on *Merco Distrib. Corp. v. Commercial Police Alarm Co.*, 84 Wis. 2d 455, 267 N.W.2d 652 (1978) (Br. at 29-30) and *Wills v. Regan*, 58 Wis. 2d 328, 206 N.W.2d 398 (1973) (Br. at 30) also is unwarranted. On appeal, the question is whether the evidence would be sufficient to support a finding of causation. *Cf. Merco*, 84 Wis. 2d at 459, 267 N.W.2d at 654-55. But the Degen report cannot support causation because it makes no effort to ac-

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[17] A footnote in *Corbin* that both *Reiman* and Conley omitted makes precisely this point:

> In *Thomas v. Kasco Mills*, 218 F.2d 256 (4th Cir. 1955), a turkey grower sued a turkey feed manufacturer for losses in production of eggs and poults alleged to have been caused by defective feed. A directed verdict for the defendant was sustained. The plaintiff suffered unusual losses; but he did not prove their cause. The court said "there were many conditions over than food which affected the productivity and growth of the flocks; and *the expert testimony was too uncertain to supply the missing link.*"

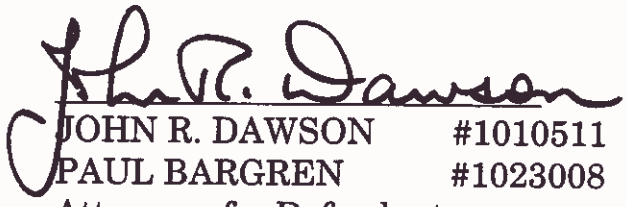
5 *Corbin on Contracts* §999, at 25-26 n.23 (1964) (emphasis added).

count for a panoply of market forces, including admittedly lawful conduct by the *Journal Sentinel*. And nothing in either *Merco* or *Wills* allows the jury to consider evidence that is mere speculation. *See, e.g., id.* at 460, 267 N.W.2d at 655.

* * *

Conclusion

For the reasons stated, defendants-respondents Journal Communications Inc. and Journal Sentinel Inc. request affirmance of the trial court's summary judgment dismissal of all claims in this action, including the predatory pricing claim relating to subscriptions that was the lone subject of this appeal.



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Form and Length Certification

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,599 words.

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COURT OF APPEALS OF WISCONSIN
DISTRICT II

Appeal No. 01-3128

CONLEY PUBLISHING GROUP, LTD.,
FREEMAN NEWSPAPERS LLC AND
LAKESHORE NEWSPAPERS, INC.,

Plaintiffs-Appellants,

v.

JOURNAL COMMUNICATIONS, INC. AND
JOURNAL SENTINEL, INC.,

Defendants-Respondents.

ON APPEAL FROM THE CIRCUIT COURT FOR WAUKESHA COUNTY
THE HONORABLE DONALD HASSIN, PRESIDING
Case No. 00-CV-222

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We will confine our remarks in this reply brief to two issues: (1) whether Wisconsin courts should follow recent federal predatory pricing doctrine in applying Chapter 133, Wis. Stat., and (2) the Journal's claim that its tactics must have been lawful because they are common in the newspaper industry.

I. Recent federal cases on predatory pricing are not a proper basis for applying Chapter 133, Wis. Stat.

Much of the Journal's argument can be summarized in two words: Brooke Group.[1] If that case, including its dicta, controls the application of Chapter 133, Wis. Stat., the Freeman has a tough row to hoe. By judicial fiat, Brooke Group effectively obliterated a cause of action that had been part of federal antitrust law since the passage of the Sherman Act in 1890.

According to Professor Hovenkamp, "[c]ourts once believed that predatory pricing was easy for a well-financed firm to accomplish, and that it was a common means by which monopolies came into existence."[2] A flavor of "mainstream" thinking about predatory pricing pre-Brooke Group comes from Professor Sullivan's Handbook of the Law of Antitrust, published by West in 1977:

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[1] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S.Ct. 2578 (1993).

[2] Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and its Practice 336 (1999).

> A firm which seeks to drive out or exclude rivals by selling at unremunerative prices will leave human traces; the very concept is one of a human animus bent, if you please, upon a course of conduct socially disapproved. If there is one task that judges and juries, informed through the adversary system, may really be good at, it is identifying the pernicious in human affairs. To contend that the conventional formulation, which looks, in a sense, for evil, ought to be amended to one which looks solely to an effect validated by economic studies is to assume too much about the precision of applied economics and to assume too little about the value of more humanistic modes of inquiry.[3]

We quote Professor Sullivan, not because we endorse all of his sentiments,[4] but because when his treatise is juxtaposed with Brooke Group and its federal progeny, this Court can get a sense for how radical a paradigm shift occurred in federal antitrust law sometime during the sixteen years between 1977 and 1993.

That such a revolution occurred is confirmed by two of its leaders, Robert Bork and Richard Posner.[5] The first edition of Judge Bork's The Antitrust Paradox: A Policy at

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[3] Lawrence Anthony Sullivan, Handbook of the Law of Antitrust 110 (1977).

[4] We do share his skepticism regarding the precision of applied economics.

[5] Judge Bork's role in the revolution was not merely scholarly. Having stepped down from the bench, he represented Brown & Williamson, the prevailing party, when Brooke Group was litigated before the Supreme Court. The loser, Brooke Group Ltd., was represented by Professor Areeda, whom the Journal (Brief at 18) has described as one of the nation's leading antitrust commentators.

War with Itself appeared in 1978. The book was reissued in 1993 and in a new introduction Judge Bork wrote:

> If what happened to antitrust [since the first edition of this book] amounts to a revolution in a major American policy, it may be useful to speculate about the causes. The decisive cause, of course, was a change in the composition of the Supreme Court. The justices who replaced much of the Warren Court's majority were not liberal ideologues and they had a better and more sympathetic understanding of the business world than did their predecessors They also had available to them a new, if still a minority, body of antitrust scholarship that made it easier to change the course of the law. . . .
>
> The sea change in antitrust began at the law school of the University of Chicago. The books and articles that initiated the transformation were written by persons connected at one time or another with that law school and, to a lesser extent, with the university's business school and economics department . . . .
>
> I mistakenly assumed that the statist and egalitarian doctrines the socialist impulse had created in the past were institutionalized and therefore immune to reform. New ideas could not change the Warren Court, but one of the great openings for reform was the fact of the mortality of justices. New justices might find new ideas congenial. In this instance, enough did.[6]

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[6] Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself x-xi, xiii-xiv (1993).

Judge Posner's Antitrust Law: An Economic Perspective appeared in 1976. The second edition was published in 2001, but now the title was simply Antitrust Law. Judge Posner explains:

> The first edition of this book. . . bore the subtitle "An Economic Perspective," implying there were other perspectives.... In the intervening years, the other perspectives have largely fallen away, a change that I have marked by dropping the subtitle from this new edition.[7]

But the intellectual winds may be shifting again. Law review articles are being written on "post-Chicago School" antitrust theory.[8] Economists employing game theory and concepts like "asymmetric information" argue that predatory pricing (among other antitrust phenomena) may be more common than the Chicago School has persuaded the federal courts to believe. According to a recent article:

> [S]ince Brooke was decided in 1993, no predatory pricing plaintiff has prevailed on the merits in the federal courts. At the same time modern economic analysis has developed coherent theories of predation that contravene earlier economic writing claiming that predatory pricing conduct is irrational. More than that, it is now the consensus view in modern economics that predatory pricing can be a successful and fully rational

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[7] Richard A. Posner, Antitrust Law vii (2d ed. 2001).

[8] See, e.g., Michael S. Jacobs, An Essay on Normative Foundations of Antitrust Economics, 74 N.C. L.Rev. 219, 259-66 (1995).

> business strategy. In addition, several sophisticated empirical case studies have confirmed the use of predatory pricing strategies. The courts, however, have failed to incorporate the modern writing into judicial decisions, relying instead on earlier theory that is no longer generally accepted.[9]

Stay tuned....

The ephemeral nature of recent federal antitrust doctrine would alone be reason enough for Wisconsin courts not to take Brooke Group and its progeny as a dispositive gloss on predatory pricing claims brought under Chapter 133, Wis. Stats. There are other reasons, as well.

Much of Brooke Group's power as a tool for summarily disposing of predatory pricing claims comes from this passage:

> The plaintiff must demonstrate that there is a likelihood [1] that the predatory scheme alleged would cause a rise in prices above a competitive level [2] that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.[10]

Clause #2, in particular, if taken seriously, creates an evidentiary burden that no plaintiff could ever meet. That

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[9] Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, Predatory Pricing: Strategic Theory and Legal Policy, 88 Geo. L.J. 2239, 2241 (2000). The authors are, respectively, John H. Scully '66 Professor of Finance and Economics at Princeton, Professor and Frank R. Kenison Distinguished Scholar of Law at Boston University Law School, and Professor of Economics and of Finance and Economics at Columbia.

[10] 509 U.S. at 227-228.

is precisely why it should not be taken seriously. Here is what Areeda and Hovenkamp, described by the Journal Sentinel as "the nation's leading antitrust commentators",[11] have to say:

> The Brooke Court found insufficient proof to satisfy clause #1 of this formula and thus did not have occasion to consider whether clause #2 required proof not only of significantly supracompetitive prices, actual or prospective, but also of their amount or duration. We doubt that the Court meant the latter, for such detailed accounting is both impossible in antitrust litigation and beyond any of the three rationales for considering recoupment.[12]

Areeda and Hovenkamp underline the anomalous nature of Clause #2's draconian evidentiary requirement in these comments, as well:

> Antitrust law's predatory pricing requirement goes much further than its structural requirements in other types of antitrust cases. For example, in cases alleging monopolization by improper patent infringement litigation, the law does not require a showing that the value of any anticipated monopoly exceeds the cost of maintaining the wrongful suit. Nor does attempt law assess such a requirement. Although all Sherman Act §2 cases require a "structural" showing that monopoly is plausible, only the law of predatory pricing exacts its

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[11] Brief of Defendants-Respondents at 18.

[12] Phillip E. Areeda & Herbert Hovenkamp, 3 Antitrust Law 322 (2d ed. 2002) (emphasis added).

> much more strenuous "recoupment" requirement.[13]

Of course the effect of exacting this much more strenuous requirement has been to obliterate predatory pricing as an antitrust claim in the federal courts.

II. If this Court returns to first principles it will conclude that there is a jury question regarding both recoupment and below-cost pricing.

What should this Court do? It should reject the extremism of Brooke Group and its progeny and return to first principles. Yes, there is bound to be a tension in predatory pricing cases because, as a rule, antitrust law favors low prices. It is only when low (below cost) prices today raise a plausible spectre of higher prices tomorrow that an antitrust claim should lie. Expert evidence can elucidate both elements of the claim: (1) Were the allegedly predatory prices below a relevant measure of cost?; and (2) Is it likely the defendant will be able to raise its prices down the road?

As Areeda and Hovenkamp point out, in all other antitrust contexts the answer to the second question -- the "recoupment" question -- turns on how the market has been defined in the first place:

> In defining the market, to be sure, we consider whether a hypothetical

[13] Id. at 296.

> monopolist of that "market" could profitably raise prices significantly....[14]

If the relevant market has been correctly defined, then a firm that obtains a monopoly of that market can -- by definition -- raise its prices.[15]

The Freeman's expert Professor Gollop defined the relevant market as "daily paid newspaper subscriptions" in Waukesha County.[16] If that definition is correct, then once the Journal (which already has a 78% market share in Waukesha County) drives out the Freeman, the Journal will have a monopoly and, by definition, will be able to raise its prices, thus satisfying the recoupment element. The Journal disagrees with Professor Gollop's definition of the market, arguing that it includes other media which would constrain the Journal's pricing power and prevent recoupment. At the very least this is a jury question, although the great weight of authority supports Professor Gollop. Here is what one court has said:

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[14] Id. at 321 n. 106.

[15] Professor Franklin Fisher of MIT has put it this way: "[M]arket definition, if it is to be an aid in the analysis [of monopoly power], has to place in the relevant market those products and services and firms whose presence and actions can serve as a constraint on the policies of the alleged monopolies." Franklin M. Fisher, Diagnosing Monopoly, The Quarterly Journal of Economics and Business, Summer 1979, p. 13.

[16] R.17 (Report of Frank M. Gollop, Ph.D., at p. 3).

> [T]he relevant product market for antitrust purposes is the local daily newspaper. The market is in fact two markets: one for readers and one for advertisers.... The weight of case authority confirms the court's almost intuitively correct definition of this market.... [T]he court notes that, in the future, it would probably make little sense for any party to relitigate this issue, given the amount of resources spent on an issue that has been resolved the very same way by every court that has considered it in any depth.[17]

Clearly, then, Professor Gollop's testimony would provide a basis for a reasonable jury to conclude that paid local daily newspapers in Waukesha County constitute the relevant market. Once the Journal drives the Freeman out of that market, it will have a monopoly and, by definition, will be able to raise prices.

All that could prevent such recoupment would be entry by new firms into the market. But, as Professor Gollop has opined, barriers to entry into the daily newspaper market are high. Once again, he is not alone in his opinion. According to the Donrey court, "[t]he barriers to entry [into the local daily newspaper market] are universally

[17] Community Publishers, Inc. v. Donrey Corp., 892 F.Supp. 1146, 1155, 1156, 1157 (1995) (emphasis added). Among the other media that the Donrey court specifically excluded from the definition of the relevant market were: national newspapers, weekly newspapers, "shoppers," radio, television, circulars and direct mail. Id. at 1155.

recognized as formidable,"[18] and any contention to the contrary is "specious."[19] Professor Gollop's testimony thus provides an adequate basis for a reasonable jury to conclude that once the Journal drives the Freeman out of business it will be able to "recoup" by raising the price of daily newspapers in Waukesha County.

The Journal also argues that Professor Gollop's testimony is insufficient as a matter of law because, in concluding that the Journal's prices were below cost, he did not consider revenue from advertising. The Journal believes that an economic analysis of predatory pricing must give the alleged predator credit for the ancillary benefits he reaps from his conduct. Professor Gollop, whose credentials we discussed in our initial brief, disagrees. We continue to believe that in Wisconsin when qualified experts disagree, summary judgment is not appropriate.

III. The Journal's argument that its tactics couldn't have been predatory because they are common in the industry is misguided.

The Journal argues that its giveaway program must have been legal because other newspapers offer giveaways also. "Free samples" are indeed a legitimate means of getting new

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[18] 892 F.Supp. at 1168.

[19] Id.

customers to try a product. But there are two problems with this rationale in the case of the Journal. First, as Professor Gollop points out, the length of the Journal's "sample" far exceeds similar offers elsewhere.[20] Indeed, a case the Journal cites, Buffalo Courier Express,[21] illustrates the point. At issue in Buffalo Courier Express was a program that offered not 49 weeks, not 23 weeks, and not 9 weeks of free daily papers, but one free paper per week for 5 weeks. The trial court issued an injunction limiting the offer to 2 weeks. The Second Circuit vacated the injunction, stating that "to impose a limit of two weeks without evidence to show that this was the limit of reasonableness -- indeed in the face of evidence that other newspapers had offered them -- is going beyond the proper judicial role."[22] But in the very same paragraph the Second Circuit said:

> Doubtless the District Court could have held, even in the absence of evidence, that if the News had offered free copies to subscribers for ten weeks, that would have gone too far.[23]

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[20] R.17 (Report of Frank M. Gollop, Ph.D., at p. 7).

[21] Buffalo Courier Express v. Buffalo Evening News, 601 F.2d 48 (2d Cir. 1979).

[22] Id. at 55.

[23] Id. (emphasis added).

The Journal's conversion program exceeded the giveaway in Buffalo Courier Express by many orders of magnitude. Indeed, even its shortest term offer exceeded by a factor of at least six the kind of offer the Second Circuit would permit to be enjoined "even in the absence of evidence."

The second problem with the Journal's "it's o.k. because everybody does it" argument, as Professor Gollop pointed out, is that the Journal's conversion offer was made to people who were already Sunday subscribers and thus familiar with the Journal's product. Such customers hardly needed weeks and weeks of free "samples" to educate them as to the newspaper's virtues.[24]

CONCLUSION

For the foregoing reasons and for the reasons stated in the Freeman's initial brief, this Court should reverse the trial court on the issues of predatory pricing, causation, and disaggregation and remand the case for trial on the merits.

[24] R. 17 (Report of Frank M. Gollop, Ph.D., at p. 7).

Dated this 24th day of April, 2002.

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CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced using a monospaced font. The length of this brief is 12 pages.

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